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# Supreme Court of the United States

October Term, 19

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Petitioner,*

vs.

FEDERAL POWER COMMISSION,

*Respondent,*

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PHILLIPS PETROLEUM COMPANY,

*Intervenor Respondents*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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STATE OF NEW YORK,
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Albany, New York,
October 9, 1959

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Intervenor-Respondents.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Public Service Commission of the State of New York, petitioner in the proceedings below, prays that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in such proceedings on August 4, 1959 (CA 3, No. 12,805).

## Opinions Below.

The opinion of the Court of Appeals is not yet officially reported. Appendix A, hereto annexed, contains the opinion (A-1 to A-7), the dissenting opinion (A-7 to A-8) and the Court's judgment entered the same day (A-9), together with the Court's order denying rehearing (A-10).

The opinion, the dissenting opinion and the order of the Federal Power Commission, issued September 4, 1958, affirmed by the Court below, are reported at 20 FPC 264 (R. 481-556). The Commission's order denying applications for rehearing is reported at 20 FPC 571 (R. 602-610).

## Jurisdiction.

The judgment of the Court of Appeals was entered on August 4, 1959. Petition for rehearing was denied on September 9, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U. S. C. §717r(b).

## Question Presented.

Is not the decision of the Court of Appeals herein in direct and irreconcilable conflict with the decision of this Court in *Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U. S. 378 (June 22, 1959)—commonly referred to as *Catco*?

## Statute Involved.

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U. S. C. §§717-717w, are set forth in Appendix B (B-1 to B-4).

## Statement of the Case.

The Commission's Opinion and Order here under review (its No. 315), issued on September 4, 1958, granted unconditional certificates of public convenience and necessity to 26 natural gas producers ("producer-applicants") authorizing sales of natural gas by them, from fields in and offshore southern Louisiana, to Transcontinental Gas Pipe Line Corporation ("Transco") at initial prices of 22.4¢ to 23.3¢ per Mcf. Simultaneously, the Commission granted Transco's related pipeline expansion application which, in large measure, was founded upon the gas acquisitions and dedications encompassed by the instant producer applications. Both of these determinations were affirmed by the Court below.

### 1. Factual Background.

By 39 applications filed between August 28, 1957 and March 3, 1958, 26 natural gas producers* requested certificates of public convenience and necessity to sell a total of approximately two trillion cubic feet of natural gas to Transco. All of the contracts upon which the applications were based were executed between August, 1957 and February, 1958—i. e., from 1 to 8 months following the respondent Commission's final, June 24, 1957, unconditional certification of the Cateo offshore sales at 22.4¢ per Mcf. On that date, climaxing a bitterly contested proceeding, respondent, in a widely publicized decision, had abandoned previous efforts to hold the 17.18¢ pre-Cateo, southern Louisiana producer initial price line, bowed to the demands of the Cateo producers and reversed its earlier orders imposing 18¢ initial price conditions on the Cateo sales.

* Including each of the following: Continental Oil Co., Atlantic Refining Co., Tidewater Oil Co. and Cities Service Production Co. —the Cateo combine.

At the time of the execution of the instant contracts and the filing of the instant applications, therefore, the highest certificated *offshore* initial price for natural gas was the newly authorized 22.4¢ per Mcf Cateo rate.* Four of the offshore producer-applicants in this proceeding immediately proposed to top that figure with initial prices of 23.3¢ per Mcf. Four others were content merely to equal it (R. 302-303).

At this time the maximum certificated *onshore* initial prices in southern Louisiana were reflected in relatively few sales at 20 and 21¢ per Mcf. The overwhelming majority of onshore sales, however (including many more recent), were at prices considerably below these maximum levels (R. 289-301).* For example, the highest (and the predominant) prices then being paid by Transco, the present purchaser, and by Tennessee Gas Transmission Company, the other major New York-serving pipeline then purchasing in the area, were, respectively, 17 and 18¢ per Mcf, including tax reimbursement.** The onshore producer-applicants here proposed to top all previous records with initial prices of 22.4 to 22.8¢ per Mcf, all but four at the higher figure. (R. 302-303).

Thus did the Cateo 22.4¢ price wash up onshore as the new bargaining floor. Thus did the contracts and producer applications in this proceeding, *per se* present to respondent prompt and complete vindication of the New York Commission's principal contention throughout the Cateo case—that certification of the unjustified 22.4¢ per Mcf initial price there would result in the elevation of (a) all

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* The only other offshore production dedicated to the interstate market at the time was the 17¢ West Delta, pre-Cateo sale. See *Atlantic Refining Co.* v. *P. S. C.*, *supra*, pp. 392-3.

** Purchases by these two pipelines alone accounted for approximately 20% of total interstate sales in Louisiana in 1958.

future initial prices and, ultimately, (b) all prices in southern Louisiana, to equal or higher levels.

As the evidence produced in these proceedings was later to show, the deleterious ramifications of the present contracts were not limited to those so readily apparent.

Upon receipt of the applications, respondent, through its Secretary, addressed letters dated March 27, 1958 to each of the producer-applicants, requesting information as to the basis used in arriving at their proposed prices. These letters, contrary to respondent's later finding on the same subject, noted the fact that the respective prices were higher than rates for any other interstate sales in the area (R. 314-371).

**2. The Hearings.**

Hearings on the producer applications were held in May, 1958. The record there compiled was identical, in substance, with that of the Commission's Catco hearings of a year earlier. That is, each applicant offered, as the sole support for its certificate request, evidence that its contract with Transco was the product of arms-length negotiation (R. 29-111). Similar information was furnished in response to the letters of respondent's Secretary (R. 383-406).

Respondent did not, however, here repeat its unorthodox Catco procedure of disassociating the producer applications from the related pipeline application. In Catco the Commission had based its final producer certificate order, *inter alia*, on its finding of a great "need" for additional gas by Tennessee, although, at the time, Tennessee's related certificate application had not yet been heard and no evidence of its "need" had yet been introduced in the Catco or any other record. Here, respondent scheduled Transco's certificate hearings in March and April 1958 and thereafter

consolidated the pipeline and producer dockets for oral argument and final Commission disposition. Thus, Transco had a concurrent opportunity to establish that it "needed" (i.e. had a market for) the additional gas it proposed to acquire from the producers. Transco's distribution company customers, in turn, had an opportunity to establish that they "needed" (i. e. had a market for) the additional gas they proposed to acquire from Transco.

There was, of course, nothing remarkable about this evidence. Indeed it would have been astonishing had Transco and its customers not been able to demonstrate their ability to dispose advantageously of gas supplies they were seeking permission to obtain. Much more surprising was the evidence, adduced through Transco witnesses themselves, that certification of the sales at the proposed initial prices would (a) necessitate an immediate rate increase by the pipeline, then estimated at 2¢ per Mcf* (R. 265-288), and (b) trigger existing prices under favored nation clauses in 35 of its other, existing gas purchase contracts in amounts totalling approximately $5,000,000 per annum (R. 124-125).

At the hearings and in its briefs before the Examiner and the Commission this petitioner contended that this evidence was wholly inadequate to justify the proposed initial price or to sustain unconditional certification of the sales at those initial price levels, and that—on the contrary—it clearly showed that such unconditional certification would not be in the public interest. Certificates of public convenience and necessity should be issued, we contended, only upon condition that the initial prices be reduced to 17¢

* Subsequent events demonstrated that Transco underestimated its required increase by nearly 100%. Its actual filing, scheduled to become effective subject to refund on November 18, 1959, calls for an increase of 3.97¢ rather than 2.0¢ per Mcf. Docket No. G-18783.

per Mcf. This was the highest price Transco was then paying for gas in the area and the highest initial price that appeared to be above criticism, i.e. not adverse to the interests of the consuming public.*

### 3. The Intermediate Decisions.

The Presiding Examiner issued his intermediate decision on the producer applications on June 17, 1958 (R. 408). By that date, a series of recent decisions by the Commission in producer Section 7 cases had effected a fundamental and critical change in the entire producer initial price certification picture and had virtually preordained the Examiner's decision here. In March, April and May 1958, in a group of uncontested (and consequently unreviewable) proceedings, of which several were heard and decided under the shortened procedure method (i. e., without submission of evidence, pursuant to Section 1.32 of the Commission's Rules of Practice and Procedure, 18 C. F. R. 1.32), respondent had taken occasion

1. to certificate southern Louisiana sales to other pipelines at initial prices up to 22.8¢ per Mcf**—thereby eliminating all but four of the instant contracts as initiators, in and of themselves, of new initial price plateaus—and

2. to shift the burden of proof of public convenience and necessity, procedurally, from applicants for certifi-

* The 17¢ rate charged by all Transco's southern Louisiana suppliers, including some of the producer-applicants herein, represented a still "unapproved" increase from their former charges of 9.797¢ per Mcf. Although the increase from 9.797¢ to 17¢ became effective and has been paid since 1955, the 17¢ figure *has not yet been demonstrated*, to the satisfaction of either respondent or the courts, to be a just and reasonable charge. See e.g., *Bel Oil Corp.* v. *F. P. C.*, 5 Cir. 1958, 255 F. 2d 548 and *Sun Oil Corp.* v. *F. P. C.*, 5 Cir. 1958, 253 F. 2d 557, *cert. den.* in both 358 U. S. 804.

** See e.g., *Southern Natural Gas Company, et al.*, Doc. No. G-13082, *et al.*, 19 F. P. C. 558.

cates to intervenors who questioned the propriety of proposed initial prices or requested initial price conditions; and to alter its minimal content, substantively, so as virtually to guaranty immediate unconditional producer certification at any initial price proposed regardless of its effect on the consuming public.*

Thereby the Commission effectively eliminated any possibility of repetition of its *Catco* fiasco, in which it ultimately found itself embarrassed by its own initial findings that the *producers* had not discharged *their* burden of proving public convenience and necessity of the there authorized 22.4¢ initial price.

In the face of these decisions, which he considered binding precedents, the Presiding Examiner, with obvious reluctance, concluded that he was compelled to recommend unconditional certification of the instant producer sales (R. 419-423).

On July 9, 1958 he also recommended certification of the related pipeline project (R. 427).

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* The new rules were first promulgated in *Hope Natural Gas Co., et al.*, Doc. Nos. G-12571; *et al.*, 19 F. P. C. 405, and thereafter applied in the decision of all producer certificate proceedings, including the present one, until forced into well deserved retirement by this Court's *Catco* decision. In summary, they provided that a producer-applicant could make out a "*prima facie*" case for unconditional certification at any initial price requested simply by submitting proof of the "existence of a market" for the gas at that price and of the "economic feasibility" of his project.

Inasmuch as gas must be discovered and produced (thus proving "economic feasibility"), and a contract of sale negotiated and executed (thus proving "existence of a market"), *before* a producer may even file a certificate application, it automatically followed that a producer's "*prima facie*" case was incontrovertibly established for him before he ever entered respondent's hearing rooms. Thereupon, respondent held, the burden of proving the *impropriety* of the proposed initial price and the necessity for any requested price condition, was upon *intervenors*. Since this burden of proof was never discharged to respondent's satisfaction, regardless of the effect of the proposed prices on the purchaser's rates or of their triggering impact, it appeared that the producer's "*prima facie*" case was, in reality, irrebutable under respondent's theory.

**4. The Commission's Determinations.**

On September 4, 1958 respondent issued its Opinion and Order No. 315, here complained of. Therein respondent reached its decision upon the basis of its new, post-Catco principles. That is, it found the producer applicants had a "market" for their sales at the proposed prices and that Transco "needed" additional gas. It thereupon concluded that the record sustained issuance of unconditional certificates for the sales. Although Opinion No. 315 discusses at length various aspects of the transactions, unconditional certification of the sales was predicated essentially upon these two factors alone.

Respondent dismissed the demonstrated $5,000,000 annual triggering effect of the initial prices with the observation that no triggered increases could "materialize" absent Commission "approval" of filings for proposed increases under Section 4 of the Act* (R. 486; 494-5). And, for some reason, still incomprehensible to petitioner, it apparently regarded Transco's contemplated 2¢ per Mcf increased rate filing, necessitated by the instant prices, as probative of the propriety of the proposed initial producer prices rather than otherwise (R. 489; 514).

Having thus predetermined its disposition of the matters, respondent then proceeded to disparage both the necessity for and legal propriety of its resort to exercise of initial price conditioning powers, in this or any other instance. The Commission cited Transco's contention that a 17¢—or any other—price condition would preclude acqui-

* In fact those triggered increases have not only "materialized", in the extremely practical sense that they are now being charged and collected, but respondent has permitted some of the filings therefor to become effective without suspension, without proof of their justness and reasonableness and without the possibility of refund.

sition of new supplies.* It cited *Mobile*** as "drawing into question the extent of our power to alter or vary the terms of initial contracts" (R. 491) and as positing an "underlying absence of legal authority in the premises" (R. 492; but see *Atlantic Refining Co.* v. *PSC*, *supra*, at pp. 391-2). Finally—and herein the "clincher"—the Commission expressed its marked reluctance to engage in, and general distaste for, any initial price conditioning endeavor "by which it would act as a kind of peace-time OPA for the natural-gas producing industry" (R. 493; but compare this with its duty to provide "a most careful scrutiny and responsible reaction to initial price proposals of producers under §7", and to "hold the line". *Atlantic Refining Co.* v. *PSC*, *supra*, at pp. 391-2).***

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* If imposed only upon Transco purchases, the price reduction condition might well have had such an effect. If imposed indiscriminately upon Transco, Tennessee and every other interstate pipeline purchaser, however—until and unless some producer-seller established the public convenience and necessity for a higher initial price level—such would definitely *not* be the case. *Atlantic Refining Co.* v. *P. S. C.*, *supra*, p. 394.

** *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332.

*** We have, to this juncture, for purposes of clarity posed this case as one in which the Commission again (as in *Cateo*) declined to resort to its initial price conditioning powers. That was its conclusion, i.e. "Accordingly, we conclude that the producer certificates shall not carry any initial rate conditions" (R. 492). In fact, however, *just such a condition was imposed!* Without a word of evidence in the record on the subject, without even a suggestion to the effect from any participant in the case, and in complete contradiction of its expressed views respecting the feasibility and legality of such Commission pursuits, the Commission ordered attached to the certificates issued to the producer-applicants the condition that they would each refund to Transco "that portion of the initial rate and charge, constituting the reimbursement for the additional [Louisiana severance] tax . . . paid [per contract requirement] by Transco should such tax be held invalid and refunded by the State of Louisiana." The producers were required to account therefor and bear the expense of effecting any such refund. R. 501; 518—Order Clause (D). Each readily acquiesced therein, i.e. "accepted" certificates so conditioned.

Simultaneously, certificates of public convenience and necessity were granted for most of the related pipeline expansion programs (R. 519).

### 5. The Decision Below.

Review below was sought (a) by petitioner and (b) by United Gas Improvement Company and Philadelphia Electric Company, two other intervenors in the proceedings before respondent. The two cases were consolidated. They were briefed and argued to the Court below *before* the issuance by this Court of its *Catco* decision on June 22, 1959. After that decision was entered, Transco and the producer-applicants, intervenors below, filed supplementary briefs with that Court urging that the *Catco* decision was not dispositive of the instant proceeding and claiming various distinctions between that case and the present one. Significantly, respondent itself did not file a supplementary brief nor did it assert any such alleged distinctions.

As phrased by the Court below (Judges Goodrich and Kalodner), the question before it was whether it was "an abuse of discretion for the Commission to grant these certificates without conditioning them as to price" (A-3). It stated that it proceeded to determination "with the text of the Supreme Court opinion [*Catco*] before us" (A-3). It concluded, nevertheless that respondent's determination, on the record before it, was "not unreasonable" (A-7).

Judge Hastie dissented, voting to "vacate the orders of the Commission in the present cases and remand with instructions to reconsider in the light of *Atlantic Refining Co. v. Public Service Commission*" (A-8).

## Reasons for Granting the Writ.

Although the Court below acknowledged the pertinence of the *Catco* decision and expressed its intention of deciding

the instant case in conformity with the principles of that opinion, petitioner respectfully submits that the Court of Appeals has misapprehended the essential aspects of this Court's reasoning and that its decision is in patent and direct conflict with that of this Court. Moreover, the effects of the decision here to be reviewed will be (a) to nullify the purpose of this Court's remand of the *Catco* proceeding to the respondent and (b) to encourage continuation of the uninterrupted—as yet—upward spiral of southern Louisiana and other gas producer initial prices, a trend this Court regarded as adverse to the interests of the consuming public and inconsistent with the primary purpose of the Natural Gas Act.

## I.

### The decision below is in conflict with this Court's *Catco* decision.

The conflict between the decision below, affirming respondent's unconditional certification of the instant sales, and the decision of this Court, remanding respondent's unconditional certification of the Catco sales, is, we think, made immediately apparent by the following comparison of the basic facts of the two transactions.

| | Catco | Seaboard |
|---|---|---|
| Proposed initial price | 22.4¢ | 22.4¢ to 23.3¢ |
| Reserves (trillion cubic feet)... | 1.75 | 2.0 |
| Purchasing area | Offshore Louisiana | On and offshore Louisiana |
| Pipeline purchaser | Tennessee Gas Transmission Co. | Transcontinental Gas Pipe Line Corp. |
| Number of sellers | 4 (one large package) | 26 (many small packages) |

| | Catco | Seaboard |
|---|---|---|
| Periodic step escalation | 2¢ every 4 years | 2¢ every 4 years |
| Favored nation escalation clause | No (except on certain contingencies) | No |
| Price redetermination clause | No | No |
| Pipeline's previous high purchase price (including tax) | 18.0¢ | 17.0¢ |
| Triggering of pipeline's other prices | None proven | Yes ($5 million annually) |
| Percentage higher than pipeline's weighted average cost of gas | 70% | 80% |
| Amount of subsequent pipeline rate increase filing (attributable principally to increased costs of purchased gas) | 3.2¢ per Mcf. | 3.97¢ per Mcf. |

This Court found that the basic facts of the Catco sales, summarized above, signalled the existence of a situation that probably would not be in the public interest. It held, consequently, that more compelling justification than that contained in the *Catco* record was essential to sustain unconditional certification at the proposed 22.4¢ initial price.

Acting upon the basis of its own Catco and Catco-engendered precedents—*and without the benefit of this Court's observations on the subject*—the Commission herein pursued its Catco course and unconditionally certificated these sales at initial prices as high as 23.3¢.

The basic facts of the instant sales manifestly "signal" the existence of a situation far more adverse to the consuming public than that indicated by their Catco predecessors. However, *the Court* below—this Court's observations on the subject notwithstanding—purported to find three factors in the Transco-Seaboard record which, it concluded, distinguished this case from *Catco* and adequately sus-

stained respondent's unenlightened issuance of unconditional certificates to these producers. These were:

1. The 22.4 to 23.3¢ Transco-Seaboard prices have, since June, 1957, come to represent the actual market price in the area, as evidenced by other sales, *starting with the Catco sales themselves*, at similar levels. Hence, unlike the Catco prices they do not, in and of themselves, initiate a new high level mark* (A-5—A-6).

2. Transco's distributing company customers would benefit from its instant purchases because the cost of natural gas at the city gates would, notwithstanding the instant prices, remain lower than the cost to them of producing equivalent quantities of manufactured gas (A-6).

3. Transco had demonstrated its need for the gas, in the consolidated record, by reflecting its inability to meet its customers' requests for additional gas from its existing reserves. In contrast, Tennessee had not so established its need for the Catco reserves on the record underlying the Catco certification order (A-4—A-5).

In taking it upon itself to *distinguish* this case from *Catco* in the first place and in relying upon these factors to do so, the Court below is doubly in error. The cited factors do not constitute, nor do they eliminate the necessity for, the

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* In this respect, first the Examiner, then the Commission and then the Court below were led astray. Four of the Transco-Seaboard contracts did in fact initiate a new high price plateau, in the very area in which the Catco contracts had performed a similar feat one year earlier. The Catco offshore Louisiana prices were 21.4¢ (ex tax). The Transco-Seaboard offshore Louisiana prices were the first to reach 22.0¢ (ex tax). The Examiner's error in this respect was called to the respondent's attention in petitioner's Exceptions to the Examiner's decision (not a part of the Record) and in its Application for Rehearing of Opinion 315 (R. 584). The same error was brought to the attention of the Court below in brief, upon oral argument and in application for rehearing.

kind of evidence this Court indicated was required to support producer initial price proposals at these levels.

**A. The rapid advance of initial prices to and beyond the Catco level makes more, not less, imperative producer justification for these prices.**

*Of course* a large (and still growing) number of sales at prices equal to or higher than Catco's were certificated in the southern Louisiana area following the Commission's certification of the Catco sales in June, 1957. This petitioner brought that very circumstance to the attention of this Court and advanced it as the primary reason for reversal of the Catco certification.* We cited *these very* Transco-Seaboard contracts and the Commission's disposition of them as the primary example of that post-Catco development.** Clearly prompted thereby, this Court observed:

> "The price certificated [in Catco] will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per Mcf. New price plateaus will thus be created as new contracts are made and unless controlled will result in 'exploitation' at the expense of the consumer, who eventually pays for the increases in his monthly bill." *Atlantic Refining Co.* v. *Public Service Commission, supra*, at p. 390.

This very proceeding represents not only the inspiration for that observation, but epitomizes the accuracy of every

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* Brief for Respondent Public Service Commission of the State of New York in *Atlantic Refining Co., et al.* v. *Public Service Commission, et al.*, Nos. 518 and 536, October Term, 1958, at pp. 36-43.

** *Ibid.* at pp. 41-42. See also Brief for Public Service Commission, *amicus curiae* in *Oklahoma Natural Gas Co.* v. *F. P. C.*, cert. granted 358 U. S. 877, cert. dismissed, 358 U. S. 948.

single aspect thereof. The price certificated in Cateo literally did "become the floor for" the Transco-Seaboard contracts, as, indeed, it also became the floor for the other sales contracts cited by the Court below as representative of the new actual market price in the area* and for numerous other sales not specifically mentioned in its opinion.**

The existence of this state of affairs—i.e., respondent's frequent repetition of its Cateo error and the consequent materialization of this Court's prediction—can hardly bear witness to the propriety thereof.

To confer legitimacy upon a Cateo descendant by reference to other Cateo progeny, certificated at similar prices upon identical principles, and by reference to the unjustified Cateo prices themselves, is the epitome of the "bootstraps" doctrine and subversive of the very essence of this Court's *Cateo* decision. There would be little purpose in this Court's requirement of further demonstration of the "reason why" for the Cateo prices (the first to pierce the pre-existing price plateau), if Cateo's descendants (the

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* Some of the sales cited by the Court were certificated in a proceeding from which, ironically, this petitioner was denied intervention on the ground that it would not be adversely affected by the determination! *Southern Natural Gas Co. et al.*, Doc. No. G-11234, Order of June 20, 1957 (unreported). The cited sales to Texas Eastern were not certificated. They were withdrawn and replaced by another proposal involving different and somewhat lower producer compensation. *Texas Eastern Transmission Co. et al.*, Doc. Nos. G-12446 *et al.*, Opinion No. 322, . . . F. P. C. . . . (June 23, 1959).

** Petitioner does not dispute that these prices represent the "actual market price" in the sense of the lowest price at which the gas could be obtained in the *unregulated* sellers' market. Neither did it contend that the Cateo price, although several cents above the previous maximum level, was not the "actual market price" in the same sense. The question in both *Cateo* and the instant case is whether that price, in light of the reason for its existence and in view of its impact upon the consuming public, is the price required by public convenience and necessity under the Natural Gas Act.

third, fourth, etc. piercings) are to escape the same obligation simply because they are similar to Catco and to every other erroneous certification made before this Court proclaimed the Commission's fundamental Catco error.*

**B. The Court's expressed conception that distributing companies will achieve "savings" by purchasing higher priced gas is without foundation. Moreover, the comparative economy of natural gas over manufactured gas or other fuels is in no way probative of the propriety of the producer initial prices.**

There is no doubt that natural gas, at the Catco price, at the Transco-Seaboard prices, or at levels well in excess of those here in dispute, is less expensive than the cost to gas distribution companies of producing equivalent volumes of manufactured gas. The fact is one of common knowledge and certainly not disputed by petitioner. We respectfully submit, however, that this truism has little if any bearing on the question whether the instant sales at the proposed initial prices are required by public convenience and necessity, and serves in no way to distinguish the present case from *Catco*. In this belief petitioner is apparently in accord with respondent, which has never, in Opinion 315 or elsewhere, cited or relied on this factor to support a producer certification. Neither did the *Catco* decision advert to this factor, although the Catco gas, being cheaper than the Transco-Seaboard gas, would, perforce, result in even greater "savings" as compared with the cost of producing manufactured gas.

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* Moreover, even if the Court below were correct in limiting the applicability of this Court's Catco decision to sales which, in and of themselves, initiate new post-Catco price plateaus, the instant proceeding meets the test. Opinion 315 was the first decision to authorize 23.3¢ initial prices. It was also the first *reviewable* decision to authorize 22.8¢ initial prices.

The opinion of the Court below states, however:

> "Finally, there was evidence in this case that the increased supply of natural gas would effect cost savings to Transco's customers who otherwise would be required to manufacture gas themselves at a higher unit cost in order to satisfy expanded consumer demand for gas." (A-6).

The Natural Gas Act was not enacted to syphon into the pockets of producers the benefit of the economic advantages (or "savings") others may achieve through their use of natural gas. Before the vast continental market was opened to the producers by the construction of long-haul interstate pipelines, they obtained little or nothing for most of their natural gas discoveries. Natural gas was virtually a useless and unsaleable by-product of the production of oil. In the early days of pipeline construction, producers were perfectly willing to sell this by-product for 2 or 3¢ per Mcf instead of flaring it.

It was this very factor—the comparative cheapness of natural as compared to manufactured gas—that was emphasized in persuading the New York Commission and the gas consuming public in general to look with favor upon the conversion to its use. It was this factor which prompted the very substantial expenditures necessary to accomplish the mechanical conversion of existing appliances, the dismantling of manufactured gas production equipment and the burgeoning expansion of gas distribution mains and facilities in the post-war era. Neither petitioner nor the consuming public was then advised that the economic benefits of the expanding use of natural gas were intended to accrue, *ipso facto*, to the natural gas producers. It does not now appear compatible with the statute to hold that the consuming public, having been induced to abandon other

fuels and to provide an immensely lucrative market for a product which had practically none before, must be satisfied with an ever-diminishing "squall" in "savings" without even inquiring why it is called upon to provide an ever-increasing "windfall" in receipts to the producers.

Further, the Court's finding is not factually accurate. There is evidence in this record, in the testimony of distribution company witnesses, of the costs their companies *would* incur *if* they were to supply service in excess of present send-outs by producing manufactured gas (R. 228-229, 240-241, 256-257). There is not one word of testimony that a single distribution company *would actually undertake* to do any such thing. The only witness who testified on that crucial aspect of the subject admitted quite frankly that his company would not and could not economically manufacture gas to supply additional service requests. Rather, it would be compelled to surrender potential customers to other fuel suppliers (R. 251-252).

The assumption of the Court below, therefore, that Transco's customers would otherwise manufacture gas to satisfy expanding consumer demands, is not only unsupported by evidence in this or any other record but is squarely contrary to the economic facts of life. There simply is no "expanding consumer demand for gas" *at manufactured gas prices*. The post-war history of the gas industry evidences a constant contraction both in number of manufactured gas customers and in volume of manufactured gas served. It shows volumes and classes of gas consumption today which were simply non-existent, uncalled for and unthinkable in manufactured gas days, even at pre-war manufactured gas prices. With the introduction and conversion to natural gas, with the consequent large scale dismantling of manufactured gas production equipment, with

the prohibitive, 1959, costs of reconstructing and placing such equipment into service anew, it is completely unrealistic to posit an undiminished growth of consumer gas demands at the prices manufactured gas would necessitate.

It is true, of course, that the increased supply of natural gas, even at Transco-Seaboard prices, will permit Transco and its distributor customers to continue an expansion of their sales and markets that would be economically impossible under manufactured gas conditions. Petitioner certainly has no objection, *per se*, to gas companies, rather than other fuel suppliers, acquiring an increasingly large share of the fuel consuming market. We contend, however, that such expansion, at these prices, cannot "effect cost savings" of any amount to any one. On the contrary, it is readily apparent that such expansion, at these prices, can only entail *increases* in gas distribution company costs, that the burden of such increases will be borne by *existing* and future gas consumers and that the benefits of such increased charges will be enjoyed almost exclusively by the natural gas producers—all in complete and utter contradiction of the purpose of the Natural Gas Act "to underwrite just and reasonable rates to the consumer". *Atlantic Refining Co.* v. *P. S. C.*, *supra*, p. 388.

**C. Under the reasoning of the *Catco* decision, Transco's admitted "need" for additional gas cannot sustain respondent's unconditional certification of the producer sales.**

It is true of course that by scheduling the pipeline certificate proceedings concurrently with the producer proceedings, rather than a year and a half later as in Catco, respondent here ensured the existence of evidence to support its finding of a pipeline "need" for additional gas, at the time the finding was made. The crux of this Court's

*Catco* decision, however, was not the deficiency of record proof to support the Commission's finding of Tennessee's "need" for the Catco gas.* Rather, Catco was remanded because of the deficiency of record proof to support the producer initial prices *per se*. *That* deficiency may not be cured or minimized by the simple device of consolidating the pipeline and producer proceedings.

Moreover, Transco's "need" for additional gas, as the evidence clearly shows, constituted nothing more than its ability to market successfully more gas than it then had available to sell. There is neither proof nor representation that Transco required immediate new purchases to satisfy adequately demands of the *present* ultimate consumers served through its facilities.

Again, petitioner disavows any objection, *per se*, to a pipeline's desire to increase its sales and expand its markets. Moreover, we believe a pipeline's ability to market the additional gas it seeks to purchase can virtually be assumed, short of proof of corporate mismanagement, from its very execution of a gas purchase contract. Further, we concede that the existence of a pipeline "need" for (i. e., ability to market) additional gas may countenance the issuance, rather than the outright denial, of producer certificates authorizing additional sales to it.

We believe, however, that under this Court's decision, pipeline ability and desire to market additional gas cannot sustain a conclusion that *unconditional* producer certificates are required by the public convenience and necessity

> (1) where the pipeline's desire for expansion would be accommodated only at the cost of increased charges to its existing customers, occasioned by the new high-price certification in question, and

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* Compare the concurring opinion, 360 U. S. 394.

(2) where issuance of price conditioned certificates would accommodate *both* the expansive desires (or "needs") of the pipeline *and* the principal (though often forgotten) purpose of the Act—consumer price protection.

Petitioner would seriously question whether public convenience and necessity would require or even permit sacrifice of consumer price protection to facilitate the expansion of pipeline sales under any circumstances, even if the alternatives were necessarily inconsistent and mutually exclusive. But that issue is not even presented in this case. As this Court has pointed out, the Natural Gas Act provides perfect methods for reconciling both desiderata. In Catco, at lower initial prices, respondent twice invoked those methods. It abandoned its efforts to impose initial price conditions only after subjection to the most extreme pressures and in the belief it was confronted with an "either/or" choice between consumer price protection and pipeline expansion. This Court held improper its sacrifice of consumer price protection, even under those conditions. Here, at initial prices *more* damaging to the consuming public than Catco's were thought to be, respondent elected not even to attempt to invoke its price conditioning authority. Its stated reasons for so refusing (i.e., its theories as to the "*prima facie* case" of producer-applicants and the "burden of proof" on intervenors and its professed doubts of the legal propriety thereof) have since been totally discredited by this Court's *Catco* opinion.

Under the circumstances, petitioner respectfully submits that the *disposition* of this proceeding by the Court below pre-empts the province of the respondent Commission to make the determinations entrusted to it, in the first instance, with knowledge of all the rules of the game. Under the

circumstances, petitioner further submits that the *holding* of the Court below—that respondent's issuance of unconditional producer certificates here was "not unreasonable"—conflicts irreconcilably with this Court's decision in *Catco*.

## II.

### The decision below completely nullifies the purpose of this Court's order of remand in *Catco*.

This Court remanded the Catco applications to respondent for further proceedings in conformity with its opinion—i.e., for the presentation of evidence demonstrating the propriety of the 22.4¢ initial price proposals and the relationship thereof to the public convenience and necessity, or, in lieu thereof, for the imposition of 17-18¢ initial price conditions (the pre-Catco predominant price level). If the decision below is permitted to stand, summary disposition of the *Catco* case by the Commission on remand, without either the demonstration or the condition, is virtually a foregone conclusion.

The 22.4¢ prices there in issue no longer initiate a new high price plateau. In fact, they now understate the going price plateau, as evidenced by their instant progeny at up to 23.3¢ per Mcf and by their other descendants at even higher initial rates. Further, as this Court is aware, Tennessee's ability to market successfully the additional Catco gas was affirmatively established, after the Commission's Catco certification, at Docket G-11107.* On remand, therefore, Tennessee's "need" for the Catco gas, in the sense found acceptable by the Court of Appeals herein, can readily be shown to be at least as compelling as Transco's

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* Brief of Public Service Commission of New York in *Atlantic Refining Co. v. PSC., supra*, at p. 7, ftn.*

"need" for the instant supplies. Indeed, it is doubtful if anything more elaborate would be necessary for that purpose than incorporation by reference of the relevant portions of the record at Docket G-11107, into the Catco producer dockets upon remand. Finally, the persuasive effect, formerly unsuspected by respondent and the producers, of the comparative economy of natural over manufactured gas has gratuitously furnished a cheap, handy, universal and infallible justification for Catco and grossly higher producer initial prices. Catco gas at 22.4¢ can readily be shown to be more economical to Tennessee's distribution company customers (as is Seaboard 23.3¢ gas to Transco's), than would be their cost of producing equal volumes of manufactured gas.

Thus, the decision below not only permits but would seem to compel respondent now to certificate unconditionally the Catco sales with no other or better justification for their prices than that offered two years ago. Having unconditionally certificated the instant sales and having been sustained in that action, respondent could not, without discrimination, impose more stringent standards of proof upon the Catco applicants than that found satisfactory for the Seaboard applicants.

In the light of its opinion we do not believe this Court remanded Catco for the insignificant purpose of pro forma correction of technical irregularities or simply for the introduction of evidence of common knowledge. We do not believe that this petitioner's and this Court's collaborative endeavor to preserve the 17-18¢ southern Louisiana initial price level, pending some persuasive record demonstration of the public convenience and necessity for its elevation, may so readily be rendered nugatory and fruitless.

## III.

**The decision below has encouraged continuation of the unjustified upward trend of producer initial prices.**

This petitioner had been firmly convinced that this Court's *Catco* decision would finally bring long needed stability to the chaotic and intolerable producer initial pricing situation in southern Louisiana. That decision seemed to say, very clearly, that the agreement of the producer and its pipeline purchaser upon a price, even though that agreement be the product of arms-length negotiation and even though the price be at the market—i.e., unregulated—level, is insufficient to sustain unconditional certification of an interstate sale where the sale at that level demonstrably would affect the consuming public adversely. In such a case, we thought, some compelling justification for the agreed price is essential or certificates may be issued only if conditioned so as to safeguard the consuming public.

If the requirements for such justification or price conditioning may properly be waived by the Court below and hence by the respondent in a case where the deleterious effects of the price are even more pronounced than in *Catco*, on the grounds that (1) the sale is at the market level, (2) the pipeline has shown its ability to sell the gas and (3) distribution companies would find it even more expensive to produce manufactured gas, then producer initial prices, notwithstanding the *Catco* decision, have clearly received another green light to soar to any extractable levels.

Absent collusion, virtually any price agreed to by a purchaser would represent the "going market price", in the sense of the lowest price at which the gas could be obtained in an *unregulated* sellers' market. Similarly, the pipeline

"need" of the sort here deemed persuasive will almost automatically be present so long as pipelines are responsibly managed and can show a market for the product they contract to purchase. And, for the reasons petitioner has outlined above, costs of manufactured gas are now so prohibitive as to exert no competitive pressure on natural gas prices for some time to come.

Respondent's recent producer Section 7 activities in southern Louisiana already attest the relatively insignificant impact of the *Cateo* decision as compared to that of the Court below. Since June 22, 1959 respondent has issued a total of six decisions in certificate proceedings affecting this production area, one, on rehearing, on July 22* and the remainder on August 10, 6 days after entry of the decision below.** In each, the record before the Commission on the producer applications was essentially identical with that before it in the instant proceeding and in Cateo. In none did it impose an initial price condition. In each it unconditionally authorized initial prices of 23.55¢ per Mcf or above (up to 24.05¢ per Mcf). In each, it purported to be guided by the decision of this Court as embossed upon (undermined) by the decision below. In each, it has promised to take appropriate action with respect to producer initial prices, of the *type* this Court contemplated, but

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* *Trunkline Gas Co. et al.*, Doc. Nos. G-1539 *et al.*, Op. No. 321, . . . F. P. C. . . . (May 22, 1959). Application for Rehearing rejected. . . . F. P. C. . . . (July 22, 1959), review pending, *Public Service Commission v. Federal Power Commission*, C. A. D. C. No. 15365 (September 14, 1959).

** *Texas Gas Transmission Co. et al.*, Doc. Nos. G-17335, Op. No. 327 . . . F. P. C. . . . (August 10, 1959); *The California Co. et al.*, Doc. No. G-16108, . . . F. P. C. . . . (August 10, 1959); *Sun Oil Co. et al.*, Doc. Nos. G-15122, . . . F. P. C. . . . (August 10, 1959); *Sunray Mid-Continent Oil Co.*, Doc. No. 14753, . . . F. P. C. . . . (August 10, 1959); *Superior Oil Co. et al.*, Doc. Nos. G-16380 *et al.*, . . . F. P. C. . . . (August 10, 1959).

*only* when presented with a proposed initial price so in excess of those *currently* in demand as to warrant such measures. The Cateo price, which this Court found inadequately supported on June 22, 1959, was only 22.4¢ per Mcf. One month later, on no better basis 24.05¢ per Mcf was certificated and is now solidly entrenched as the going, non-suspect level, both offshore and on dry land, in southern Louisiana. Petitioner and the consuming public have yet to see respondent call a halt.*

## Conclusion.

For all of the foregoing reasons, it is respectfully urged that this petition for a writ of *certiorari* be granted; that the judgment of the Court of Appeals be reversed; that the respondent's instant producer certifications be vacated; and that the matters be remanded to the Commission for further proceedings upon the controlling precedent of and in accordance with *Atlantic Refining Co.* v. *Public Service Commission*, 360 U. S. 378 (1959). In lieu of the latter,

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* In one proceeding, involving gas produced in Texas and New Mexico and sold to a non-New York-serving pipeline, respondent has actually, for the first and only time since its earlier superseded Cateo orders, imposed initial price conditions. *Transwestern Pipeline Co., et al.*, Doc. Nos. G-14871, *et al.*, Op. No. 328, . . . F. P. C. . . . (August 10, 1959). There, however, the proposed initial prices were up to 6¢ above the previous maximum paid in the area. There also, however, the Commission on September 23, 1959 granted rehearing.

In southern Louisiana, where initial prices have advanced as rapidly but by more gradual stages, respondent has not yet found any price so markedly in excess of the prevailing level as to warrant exercise of its conditioning authority.

we respectfully urge that the matter be set down for argument at this term.

Respectfully submitted,

PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK,

By KENT H. BROWN,
Counsel.

BARBARA M. SUCHOW,
GEORGE H. KENNY,
Of Counsel.

Albany, New York,
October 9, 1959.

# Appendix A.

## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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Nos. 12,797 and 12,805

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THE UNITED GAS IMPROVEMENT COMPANY,
PHILADELPHIA ELECTRIC COMPANY,
Petitioners in No. 12,797

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK,
Petitioner in No. 12,805

*v.*

FEDERAL POWER COMMISSION,
Respondent

PAN AMERICAN PETROLEUM CORPORATION,
ATLANTIC REFINING COMPANY;
CITIES SERVICE PRODUCTION COMPANY,
HUMBLE OIL & REFINING COMPANY,
OHIO OIL COMPANY,
OIL PARTICIPATIONS INCORPORATED,
TIDEWATER OIL COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
CONTINENTAL OIL COMPANY,
MAGNOLIA PETROLEUM COMPANY,
PURE OIL COMPANY,
SUN OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST,
PHILLIPS PETROLEUM COMPANY,
Intervenors

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ON PETITIONS FOR REVIEW OF DECISION AND ORDER OF THE
FEDERAL POWER COMMISSION.

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Argued June 5, 1959

Before GOODRICH, KALODNER and HASTIE, Circuit Judges.

## Opinion of the Court.

(Filed August 4, 1959)

By GOODRICH, Circuit Judge.

These cases are two petitions seeking review of action of the Federal Power Commission. They present the same questions and attack the same order.[1] They have been argued together and will be disposed of in one opinion.

The Federal Power Commission has granted permanent certificates of convenience and necessity to twenty-six gas producers, involving thirty-eight applications, who have made contracts for the sale of gas produced in southern Louisiana and offshore areas to Transcontinental Gas Pipe Line Corporation (Transco) for transportation and resale in interstate commerce. The Commission also granted permanent certificates of public convenience and necessity to Transco to construct additional pipe line facilities to carry the supply of natural gas authorized by the producers' certificates.

The matters before the Commission involving this large transaction covered many items. There were contracts for the sale of gas by the producers. There were incidental and for our purposes here unimportant provisions concerning arrangements with buyers from Transco's pipe line. There was an elaborately worked out and thoroughly considered plan for the storage of gas in underground reservoirs in western Pennsylvania. There was a proposal by Transco for a huge increase in pipe line facilities to serve the New York and Philadelphia areas. Transco's capital expenditure is about $167,000,000.

While the factual background is wide the subject litigated in this review becomes a narrow one. Transco's customers called for more gas than Transco was able from its then sources to supply. Transco negotiated arms-length contracts with these twenty-six producers. There is no

[1] The opinion and order are contained in Federal Power Commission Opinion No. 315, issued September 4, 1958.

suggestion that there was any collusion in the formation of these contracts. They call for prices ranging from 22.4 cents to 23.3 cents per Mcf of gas.

It is the contention of the petitioners that the Commission abused its discretion in not attaching to the producers' certificates conditions limiting the price to be paid by Transco to a level below that set in the contracts.[2] It is pointed out by them that the price of natural gas obtained from the area here concerned has been increasing rapidly. These last certificates of convenience and necessity which approve this scale of prices will cause another general rise in gas prices, it is argued, and thus produce another loop in the rising spiral.

This is really the only point in the case, when all the argument is made: Was it an abuse of discretion for the Commission to grant these certificates without conditioning them as to price? We have said in the *Signal* case[3] that the Commission could make its certificate conditioned upon a price limitation.[4] We did not say that it must.

Since the case was submitted to this Court the Supreme Court has affirmed us in a case referred to by the parties as "CATCO".[5] We proceed in this case, therefore, with the text of the Supreme Court opinion before us. The Court

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[2] Petitioners in No. 12,797, United Gas Improvement Company and Philadelphia Electric Company, attack only the granting of the unconditional certificates to the producer applicants. Petitioner in No. 12,805, Public Service Commission of the State of New York, urges additionally that Transco's certification for the construction of additional pipe line facilities is unlawful since it is dependent on the issuance of certificates to the producers.

[3] *Signal Oil And Gas Co.* v. *Federal Power Comm'n*, 238 F. 2d 771 (1956), *cert. denied*, 353 U. S. 923 (1957).

[4] ". . . The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 56 STAT. 84 (1942), 15 U. S. C. A. §717f(e) (1948).

[5] *Atlantic Refining Co.* v. *Pub. Serv. Comm'n*, U. S. (June 22, 1959), *affirming on other grounds, Public Service Comm'n of N. Y.* v. *Federal Power Comm'n*, 257 F. 2d 717 (3d Cir. 1958).

affirmed the Third Circuit in sending that case back to the Commission for further hearing. The grounds upon which the majority[6] rested its decision differed from those relied on by this Court and we shall, of course, keep our eye on the Supreme Court opinion rather than our own.

The Supreme Court pointed out that there had been no showing that "'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas.'" — U. S. at —. That there is a large and immediate need for more gas in the territory served by Transco was fully developed in the testimony and made the subject of findings by the Commission.

Transco presented testimony at the producers' hearing that it would be unable to meet the estimated average day and peak day requirements of its customers from existing gas supplies. According to the evidence, without increasing its supply Transco would experience annual deficiencies of 8,162,000,000 cubic feet in 1959, 24,899,000,000 cubic feet in 1960 and 23,081,000,000 in 1961. Converted to average daily volumes, these deficiencies would amount to 22,400,000 cubic feet in 1959, 68,200,000 cubic feet in 1960 and 63,200,000 in 1961.[7] Inclusion of the gas reserves which are the subject of these proceedings would mean that Transco need not experience its first annual deficiency until 1971. Apart from the storage field aspect of its certification, Transco will supply an additional 173,634,000 cubic feet daily to its existing customers.

At the Transco hearing prepared testimony by Transco's customers indicated that in 1959 and in the following years substantial deficiencies in the supply of natural gas would exist. In sum, these gas companies, serving local

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[6] Mr. Justice Harlan, joined by Mr. Justice Frankfurter, concurred on the narrow ground that there was no evidence to support the findings that (1) "'the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas'" and (2) "'there was serious danger that petitioners' gas would be permanently lost to the interstate market unless an unconditional certificate were granted on their terms.'" ..... U. S. at .....

[7] The peak day deficiencies would total 116,800,000 cubic feet in 1959, 159,400,000 cubic feet in 1960 and 171,200,000 in 1961.

consumers, attested with facts and figures to the increased consumer demand for gas, their inability to satisfy that demand from existing supplies, and the desirability of purchasing increased quantities of natural gas rather than undertaking the more expensive task of expanding facilities and producing manufactured gas.

The Supreme Court opinion emphasizes strongly that attention must be given the price factor in deciding the question of issuance of the convenience and necessity certificate. The Court pointed out that Section 5 of the Natural Gas Act[8] is not a sufficiently adequate protection for the consumer. If the price is too high the consumer will have been paying too much for his gas while the long drawn out proceeding under Section 5 is pending and there is no provision for his getting a refund. 15 U. S. C. A. §717d (1948). Therefore, the next point necessary to consider is whether the attention given to the subject of price to be paid for the gas was sufficient on the part of the Commission and whether the conclusion it reached was reasonable.

The purchasers' certificates authorize the sale of approximately 2 trillion cubic feet of natural gas to Transco from the southern Louisiana and offshore areas at contract prices ranging from 22.4 to 23.3 cents per Mcf. The contracts do not contain favored-nation or price redetermination clauses.

The trial examiner found that these prices "are materially higher than the levels involved in Transco's prior purchases or existing contracts." Transco's highest previous rates were 17 cents per Mcf. However, these new prices do not establish "a new price plateau in the southern Louisiana shopping area."[9] The Catco price was as high as the minimum rates in the Transco contracts. Catco

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[8] 52 Stat. 821 (1938), as amended, 15 U.S.C.A. §§717-717w (1948), as amended, 15 U.S.C.A. §§717(c), 717r (Supp. 1958).

[9] Several of the producers testified that negotiations with other pipe line companies had centered around the range of prices ultimately agreed to by Transco. A few stated that they had received firm offers at these prices from other pipe line companies. There can be little doubt that the Transco contract prices actually represent the market price for natural gas in the area

involved the sale of 1.67 trillion cubic feet of gas from the offshore area at an initial rate of 22.4 cents per Mcf. The contracts contained escalation clauses calling for periodic increases in specific amounts.[10] In addition to the Catco agreements there were contracts for sales to Southern Natural Gas Company at 22.8 cents per Mcf and to Texas Eastern Transmission Corporation at 23.9 cents.[11] Two nonjurisdictional, i.e., intrastate, contracts called for delivery of about 100 million cubic feet daily at prices which would reach 25 cents per Mcf by the middle of 1960.

The trial examiner also found that ". . . Transco's purchase of gas at the proposed levels will 'trigger' many of its existing contracts. . . ."[12] The amount of the "triggering" was estimated to be $5,483,000 in 1959, $4,177,000 in 1960 and $5,192,000 in 1961. A Transco witness testified that the total effect of the new contracts, including the "trigger" of existing contracts, on Transco's purchased gas cost, system-wide, would be an increase in the rank of 2 cents per Mcf.[13] Finally, there was evidence in this case that the increased supply of natural gas would effect cost savings to Transco's customers who otherwise would be required to manufacture gas themselves at a higher unit cost in order to satisfy expanding consumer demand for gas.

The Supreme Court opinion in Catco stated clearly that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5." —U.S. at —. It did require "careful

[10] —U.S. at —.

[11] Comparisons are weak, however, since neither the quantities involved in these sales, nor the terms and conditions of these contracts are part of the record.

[12] Before the "triggered" increases can be passed along to purchasers, the Commission must approve the rates under the standards established in Section 4 of the Act, 15 U.S.C.A. §717c (1948).

[13] This estimate was made in the producers' hearing. Evidence in the pipe line hearing indicates that Transco's system-wide average cost of gas purchased would increase by 3 cents.

scrutiny and responsible reaction to initial price proposals of producers under §7." *Ibid.* It also recognized that § 7 requires the Commission to "evaluate all factors bearing on the public interest." *Ibid.*

It is the "all factors" aspect which makes these cases so hard to decide. One Commissioner dissented in this case as he has in several proceedings prior. Members of a careful and experienced court divide when the Commission's order comes before them for review. *Oklahoma Natural Gas Co.* v. *Federal Power Comm'n*, 257 F. 2d 634 (D. C. Cir. 1958). See also *Florida Economic Advisory Council* v. *Federal Power Comm'n*, 251 F. 2d 643 (D.C. Cir. 1957).

The balancing of the weight to be given the various factors is not unlike that which a court of equity through the years has given in deciding whether an injunction is to issue in a case before it. It involves an exercise of judgment and the reasons which sway that exercise may be hard to articulate in a particular case.

The weighing of the factors and the conclusion to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been considered and the conclusion reached is not unreasonable, the conclusion stands whether it is the one we should have reached or not. That, in our judgment, is the case here.

The order of the Commission will be affirmed.

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HASTIE, Circuit Judge, dissenting.

The opinion of the court reasons that the result reached by the Federal Power Commission in these cases is a permissible result despite the strictures of the decision rendered by the Supreme Court on June 22, 1957 in *Atlantic Refining Co.* v. *Public Service Commission*, — U.S. —. I am not now prepared to challenge that view. However, before reaching that point it seems appropriate to ask whether the Commission would have proceeded in the way it did and reached the result it reached here, had the sub-

sequent teaching of the *Atlantic Refining* case then been before it.

Certainly the *Atlantic Refining* case indicates an approach and emphasizes considerations which might well have led the Commission to a different result, with or without further inquiry as to reasonable rates, in the cases now before us. To me that conclusion is a sufficient reason for sending these cases back to the Commission for reexamination. I would vacate the orders of the Commission in the present cases and remand with instructions to reconsider in the light of *Atlantic Refining Co.* v. *Public Service Commission.*

A true Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.

# UNITED STATES COURT OF APPEALS,

FOR THE THIRD CIRCUIT.

No. 12,805

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

*vs.*

FEDERAL POWER COMMISSION,
Respondent.

PAN AMERICAN PETROLEUM CORPORATION,
ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
HUMBLE OIL & REFINING COMPANY,
OHIO OIL COMPANY,
OIL PARTICIPATIONS INCORPORATED,
TIDEWATER OIL COMPANY,
TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
CONTINENTAL OIL COMPANY,
MAGNOLIA PETROLEUM COMPANY,
PURE OIL COMPANY,
SUN OIL COMPANY,
UNION OIL COMPANY OF CALIFORNIA,
W. H. HUNT, Trustee for Hassie Hunt Trust,
PHILLIPS PETROLEUM COMPANY,
Intervenors.

Present: GOODRICH, KALODNER and HASTIE, Circuit Judges.

**Judgment.**

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the Federal Power Commission in this case be, and the same is hereby affirmed.

Attest:

HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

August 4, 1959

# UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,805

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

Petitioner,

*vs.*

FEDERAL POWER COMMISSION,

Respondent.

**Sur Petition for Rehearing.**

Present: GOODRICH, KALODNER, STALEY and HASTIE,
Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

By the Court

GOODRICH
Circuit Judge

Dated: September 9, 1959.

## Appendix B.

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by the Act of February 7, 1942, c. 49, 56 Stat. 83 and the Act of August 28, 1958, 72 Stat. 947; 15 U. S. C. 717-717w, are as follows:

SEC. 7 (c) No natural-gas company or person which will be a natural gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be

issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * *

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to

abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b) of this section, the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this chapter.

(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If

any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended.

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# BRIEF AMICUS CURIAE OF PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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Office-Supreme Court, U.S.
FILED
OCT. 1 [illegible]
JAMES R. [illegible]

In The
# Supreme Court of the United States

October Term, 1959

NO. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
*Petitioner*

v.

FEDERAL POWER COMMISSION ET AL.,
*Respondents*

NO. 473

THE UNITED GAS IMPROVEMENT COMPANY,
*Petitioner*

PHILADELPHIA ELECTRIC COMPANY,
*Petitioner*

v.

FEDERAL POWER COMMISSION ET AL.,
*Respondents*

## BRIEF AMICUS CURIAE OF PENNSYLVANIA PUBLIC UTILITY COMMISSION, IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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# BRIEF AMICUS CURIAE OF PENNSYLVANIA PUBLIC UTILITY COMMISSION IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The Opinion of the United States Court of Appeals is not yet reported (See Decision printed in Public Service Commission of the State of New York Petition, Appendix A, and The United Gas Improvement Company and Philadelphia Electric Company Petition, Appendix A). The Opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's Order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

## JURISDICTION

The asserted grounds for jurisdiction are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

## QUESTIONS PRESENTED

The questions presented are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

## STATUTES INVOLVED

The applicable provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §717-717w, are printed in Appendix B of the Petition of the Public Service Commission of the State of New York and in Appendix B of the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

## INTEREST OF AMICUS CURIAE

The Pennsylvania Public Utility Commission is an arm of the legislature of the Commonwealth of Pennsylvania, empowered and directed by law to administer and enforce the Pennsylvania Public Utility Law, Act of May 28, 1937, P. L. 1053, 66 Purdon's Penna. Statutes Annotated 1101, which statute reposes in the Commission responsibility for the regulation of public utilities and preservation and protection of the public against unjust and unreasonable intrastate rates for public utility service.

This brief is filed pursuant to Rule 42(4) of this Court.

The issues presented by the instant case vitally affect every one of the more than two million Pennsylvania gas consumers represented by this Commission.

The Court below approved the principle that gas producers need not justify initial prices in certificate proceedings and, if this principle is established, the incessant spiral of higher gas prices will continue ever upward, particularly where they arise in the south Louisiana shopping area involved in this case, which area is a principal source of supply to all major interstate gas suppliers in Pennsylvania, and in which prices have bolted from 17¢ to the level of 23.3¢ per Mcf set in this case. New price plateaus will thus be created as new contracts are made and, unless controlled, will result in exploitation at the expense of the consumer, who eventually pays for the increases in his monthly bill, and whose interests, both the Federal Power Commission and the Pennsylvania Commission are charged with protecting.

This protection cannot be afforded the ultimate consumer if producer sales at ever-increasing prices remain unjustified and uncontrolled by the regulatory body entrusted with this responsibility, since the pipeline buyer, whose economic well-being depends on continued expansion, simply passes these increased costs on to the consumer. Obviously, in such a market, effective consumer protection against unjust and unreasonable rates cannot be accomplished unless prices are controlled when the initial sale is made. The Pennsylvania Commission thought such protection was forthcoming when this Court held in the *Phillips** case that independent producers were subject to regulation under the Natural Gas Act. It thought further

* *Phillips Petroleum Co. v. State of Wisconsin*, 347 U. S. 672 (1954).

that consumer protection from the almost interminable delay presently existing in the processing of Section 5 proceedings was forthcoming when this Court told in *Catco*[*] that the Federal Power Commission must make a "careful scrutiny and responsible reaction to initial price proposals of producers" and stated that producer "proposals must be supported by evidence showing their necessity to 'the' present or future public convenience and necessity' before permanent certificates are issued." However, if the decision of the Court below affirming the principle of market price as sufficient evidence of public convenience and necessity is not reversed, the protection afforded the consumer by the *Catco* criteria will be lost and the producers will, in effect, accomplish by this decision what they could not accomplish by legislation, namely, amendment of the Natural Gas Act to remove them from federal regulation. Thus the consumer would be left unprotected, for, as recognized by this Court, the market price for gas is determined by the highest price being paid for gas by any other pipeline company in the area. Therefore, as far as the consumer is concerned, the market price test is no test at all. It is for these reasons that this Brief *Amicus Curiae* is filed.

[*] *Atlantic Refining Co. v. New York Public Service Commission*, 360 U. S. 378 (1959).

## ARGUMENT

### The Court Below, While Purporting To Follow This Court's Catco Decision, Effectively Flouted It

This Court in its *Catco* decision admonished the Federal Power Commission, as follows:

> "What we do say is that the inordinate delay presently existing in the processing of 7 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for 7(e) requires the commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued."

Applying this criterion, this Court found only evidence of arm's-length bargaining in the record to support 22.4¢ per Mcf south Louisiana off-shore prices and held that this was not substantial evidence. Hence, the Court reversed the Commission and remanded the case. In analyzing the facts, the Court found "damaging" evidence from the fact that the prices proposed (a) were seventy per cent higher than the pipeline buyer's weighted average cost; (b) were greatly in excess of the highest amount then being paid for gas by the pipeline; and (c) would trigger favored nation clauses and cause a pipeline rate increase. This same situation of utter and complete lack of price justification evidence is present in this case, as well as even stronger record evidence that the public interest will be adversely affected by the issuance of permanent certificates without a consumer-protecting condition. For example, the record in this case clearly shows that (a) the proposed prices range: support 22.4¢ per Mcf to 23.3¢ per Mcf for on and off-shore south Louisiana gas; (b) Transco up to this time was paying 16¢ per Mcf for gas purchased in Louisiana; (c) it was necessary to pay the prices proposed because of the new price established by the *Cato* sale and others subsequent to *Cato*; (d) the initial prices would clearly trigger favored nation clauses in some thirty-six Transco purchase contracts; and (e) this triggering would increase Transco's costs by almost $5 million annually, thus requiring the filing of a new pipeline rate increase. Yet, despite the virtual identity of facts in the two cases, the Court below reached a directly opposite result and approved the issuance of permanent unconditioned certificates.

The only difference between the cases is that in the case the Commission consolidated for decision only the producer certificate cases with those of the related pipeline expansion programs, whereas in *Cato* there was no similarly consolidated pipeline proceeding. In neither case, however, were the producers' initial price proposals supported by cost or any financial data. It is respectfully submitted that "careful scrutiny and responsible reaction to initial price proposals" does not mean permanent unconditioned certification on the basis of evidence of arm's length bargaining and evidence of need for gas. If that is the case, the Commission on remand in *Cato* need only to consolidate the *Cato* pipeline case with the producer cases to have a record by which to meet this Court's criteria. Obviously, the test approved by the Court below is no test at all in a business climate where the price is admittedly set by competing pipelines commencing their price offers with the highest price previously paid for gas in the area and then outbidding each other, with the gas going to the highest bidder, who need not be paid in order to prosper, and who simply passes on the increased cost to the consumer. To the contrary, evidence of arm's length bargaining in such a business climate, as in a captive market, signals the need for even stricter price scrutiny. Accordingly, we submit that the decision of the Court below affirming the Commission criteria is in error and will seriously weaken the protection afforded consumer interests by the *Cato* decision. The effect of the decision below has already become alarmingly apparent.

First of all, the prices certificated in this case have firmed up at a new price pattern slightly above the *Cato*

price in the important south Louisiana supply area. This will directly affect all gas consumers served through pipelines supplied in this area. Secondly, and perhaps of greater importance, is the effect of the lower Court's decision on the Commission decision in future certificate proceedings. If the Commission refuses to require justification of the producers' initial prices in this case, as the Court below erroneously decided to be permissible under *Cities*, the effect of that decision is greatly weakened. Unfortunately, that is precisely what has happened. In a series of recent decisions, the Commission has certificated initial prices even in excess of the prices involved here, relying on the decision of the Third Circuit:

*The California Company, supra*, Docket No. G-16,108 et al., August 10, 1950;

*Sun Oil Company et al.*, Docket No. G-15,122 et al., August 10, 1950;

*Sunray Mid-Continent Oil Company*, Docket No. G-14,753, August 10, 1950;

*Superior Oil Company et al.*, Docket No. G-16,380 et al., August 10, 1950;

*Texas Gas Transmission Corp., et al.*, Docket No. G-17,335, et al., Opinion No. 327, issued August 10, 1950;

*South Georgia Natural Gas Company et al.*, Opinion No. 325, issued August 7, 1950.

In those cases, no evidence was submitted by the producers other than proof that the proposed price was arrived at by arm's length bargaining. Hence,

the incessant spiral of initial prices continues ever upward to the intolerable detriment of the consumer.

Accordingly, unless the decision of the Court below is reversed, the consumer, for whose protection the Natural Gas Act was passed, will find the gas companies provided with a continuing "windfall" with a "consequent squall" for the consumers.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
EDWARD MUNCE,
*Assistant Counsel*
THOMAS M. KERRIGAN,
*Counsel*

Pennsylvania Public Utility Commission
North Office Building
Harrisburg
9th October, 1959

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FILED
OCT 21 1959
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1959

**No. 459**

Public Service Commission of the State of New York,
*Petitioner,*

*v.*

Federal Power Commission, et al.,
*Respondents.*

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**No. 473**

The United Gas Improvement Company,
Philadelphia Electric Company,
*Petitioners,*

*v.*

Federal Power Commission, et al.,
*Respondents.*

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ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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## BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN

---

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ON PETITIONS FOR A WRIT OF CERTIORARI
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---

## BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN

---

*The interest of amicus curiae*

The State of Wisconsin is one of the states of the United States. The Public Service Commission of Wisconsin is an agency of the State of Wisconsin, having jurisdiction, among other things, to regulate the adequacy of service furnished by and reasonableness of rates charged by public utilities engaged in the distribution and sale of natural gas in the State of Wisconsin. Both are interested in complete, effective and permanent regulation of matters relating to natural gas, to the end that the ultimate consumer will receive reasonably adequate natural gas service at just and reasonable prices. Both participated on brief and in oral argument in the case of *Phillips Petroleum Company v. Wisconsin*, 347 U. S. 672.

Their interest *amicus curiae* in the instant case lies in the fact that the judgment of the Court of Appeals sought to be reviewed could, if not corrected in this court, result in impairing the recent decision of this court in *Atlantic Refining Company v. Public Service Commission of New York*, 360 U. S. 378, which latter case also lays down a principle of great value and importance in providing all natural gas consumers with effective regulation.

*Argument*

The petitions in the above captioned causes filed by the United Gas Improvement Company, Philadelphia Electric Company, and Public Service Commission of the State of New York seek to have this court review and reverse the judgment of the United States Court of Appeals for the

Third Circuit in *United Gas Improvement Company, Philadelphia Electric Company, Public Service Commission of the State of New York v. Federal Power Commission*, (Opinion filed August 4, 1959) Hastie, Circuit Judge dissenting, which affirms an order of the Federal Power Commission issued in re *Transcontinental Gas Pipe Line Corporation*, G-13143, G-13590, G-13745, *et al.* on September 4, 1958 reported in 20 F. P. C. 264.

The State of Wisconsin and Public Service Commission of Wisconsin, as amicus curiae, urge that the petitions for certiorari be granted. The question upon which the legality of the aforesaid order of the Federal Power Commission depends, is governed by the decision of this court in *Atlantic Refining Company v. Public Service Commission of New York* (June 22, 1959), 360 U. S. 378, 3 L. ed 2d 1312.

The majority decision of the Court of Appeals, recognized the significance of this decision of this court, but in deciding the instant case, proceeded upon a theory which, if permitted to stand, would as a practical matter seriously impair the principle announced by this court in the *Atlantic Refining Company case*. In that case the opinion of the court delivered by Mr. Justice Clark, in discussing the obligation of the Federal Power Commission to consider the initial price of the gas in issuing a certificate of convenience and necessity for sale and delivery of gas by a producer to an interstate pipeline under Section 7(e) of the Natural Gas Act, said *inter alia*, page *1319:*

"The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591, 88 L. ed. 333, 64 S. Ct. 281 (1944). As the original § 7(c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.' 52 Stat. 825. The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. * * *"

Then after further discussion as to the power and duty of the Federal Power Commission under Section 7 of the Natural Gas Act, this court said, pages 1320-1:

"* * * What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7(e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals

the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued."

The Court of Appeals, (majority decision), after reviewing the decision of this court in the above cited case and various factual data pertaining to the instant case, states in the instant case:

"It is the 'all factors' aspect which makes these cases so hard to decide. One Commissioner dissented in this case as he has in several proceedings prior. Members of a careful and experienced court divide when the Commission's order comes before them for review. *Oklahoma Natural Gas Co. v. Federal Power Comm'n.* 257 F. 2d 634 (D. C. Cir. 1958). See also *Florida Economic Advisory Council v. Federal Power Comm'n.* 251 F. 2d 634 (D. C. Cir. 1957).

"The balancing of the weight to be given the various factors is not unlike that which a court of equity through the years has given in deciding whether an injunction is to issue in a case before it. It involves an exercise of judgment and the reasons which sway that exercise may be hard to articulate in a particular case.

"The weighing of the factors and the conclusion to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been considered and the conclusion reached is not unreasonable, the conclusion stands whether it is the one we should have reached or not. That, in our judgment, is the case here."

The foregoing concept, if not rejected by this Court, will have a most serious effect upon the doctrine of *Atlantic Refining Company v. Public Service Comm., supra.* The reason is that it in effect gives approval to having the Federal Power Commission simply state in other cases, "we have weighed all factors including price and in our judgment a certificate should issue." Such a result would give the Federal Power Commission a blank check in every case and make any subsequent court review an idle gesture.

The view taken by the Court of Appeals would permit the Federal Power Commission to proceed in this type of case without making proper findings of fact on the vital issue concerning the impact of price upon public convenience and necessity in this type of case, and hence would be contrary to fundamental principles as stated by this court in *United States v. Pierce Auto Freight Lines*, 327 U. S. 515, 533 and *Florida v. United States*, 282 U. S. 194.

We file this brief *amicus curiae* urging that the petitions for certiorari be granted in this case because the decision of this court in *Atlantic Refining Co. v. Public Service Comm., supra*, is a landmark case and lays down a basic principle of the utmost importance to all consumers of natural gas wherever situated in continental United States. It would be tragic if that decision were to lose its potency within 60 days of the time when it was delivered, but that, we fear, could be the result if the decision in the instant case is permitted to stand. The decision of the Court of Appeals in the instant case has an importance far beyond the con-

fines of this case, and we respectfully submit that the petitions for certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

**No. 459**

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

*Petitioner,*

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THE UNITED GAS IMPROVEMENT COMPANY

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v.

FEDERAL POWER COMMISSION,

*Respondent,*

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, Trustee for Hassie Hunt Trust, PHILLIPS PETROLEUM COMPANY,

*Intervenor Respondents.*

## MOTION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE* IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI, AND BRIEF, *AMICUS CURIAE*.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

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**No. 459**

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

*v.*

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

---

**No. 473**

---

THE UNITED GAS IMPROVEMENT COMPANY,
Petitioner,

PHILADELPHIA ELECTRIC COMPANY,
Petitioner,

*v.*

FEDERAL POWER COMMISSION,
Respondent,

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, Trustee for Hassie Hunt Trust, PHILLIPS PETROLEUM COMPANY,
Intervenor-Respondents.

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE.*

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Public Service Electric and Gas Company, respectfully moves this Honorable Court

for leave to file the accompanying brief in the above-entitled cases as *Amicus Curiae*, pursuant to Rule 42 of the Revised Rules of the Supreme Court. The consent of the parties in legal interest in the record was requested by letter mailed October 14, 1959. The consents of the Public Service Commission of the State of New York, The United Gas Improvement Company, Philadelphia Electric Company and Union Oil Company of California have been obtained. The Ohio Oil Company, The Pure Oil Company, Pan American Petroleum Corporation, Cities Service Production Company, The Atlantic Refining Company, Continental Oil Company, Hassie Hunt Trust and Socony Mobil Oil Company (successor to Magnolia Petroleum Company), have refused to accord their consent. Up to the time of printing no response has been received from the Solicitor General of the United States, the Federal Power Commission, Respondent, or the remaining intervenor-respondents.

Public Service Electric and Gas Company is a purchaser of large volumes of natural gas from three transmission pipe line corporations. It participated as a party in the hearings before the Federal Power Commission in the matters of *Transcontinental Gas Pipe Line Corporation, Docket Nos. G-13,143, et al.*, 20 F. P. C. 264 (25 PUR 3d 157), which proceedings, commonly referred to as the Transco-Seaboard case, are the subject matter of the instant petitions. Public Service Electric and Gas Company was one of the successful parties in *Atlantic Refining Company, et al.* v. *Public Service Commission of the State of New York, et al.*, 360 US 378, commonly referred to as the CATCO case. It is the position of Public Service Electric and Gas Company that there is a direct conflict between the decision in the matter at issue (Transco-Seaboard) and the decision of this Court in the CATCO case. These cases involve the propriety of certain orders of the Federal Power Commission

pertaining to the issue of initial prices in natural gas producers' certificate proceedings. Public Service Electric and Gas Company is vitally interested in and concerned with the field price of gas since it and its customers are directly affected by any increase in this element of the cost of gas. The failure of the Commission to condition the granting of the certificates under Section 7 of the Natural Gas Act forecloses the possibility of refunds to Movant's customers in the event the initial prices are subsequently found to be unjust and unreasonable. Refunds of this character to Public Service Electric and Gas Company are passed on to its customers by the operation of the Raw Materials Adjustment Clause incorporated in its Tariffs for Gas Service filed with the Board of Public Utility Commissioners of the State of New Jersey. This failure to protect the consumer is contrary to the intent of Congress which is to protect consumers from exploitation at the hands of natural gas companies. This policy was clearly enunciated by this Court in *F. P. C. v. Hope Natural Gas Company*, 320 US 591 (1944) and in *Phillips Petroleum Company v. Wisconsin*, 347 US 672 (1954).

EDWARD S. KIRBY,
Attorney for Public Service Electric
and Gas Company.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959.

**No. 459**

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
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*v.*

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

**No. 473**

THE UNITED GAS IMPROVEMENT COMPANY,
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PHILADELPHIA ELECTRIC COMPANY,
Petitioner,

*v.*

FEDERAL POWER COMMISSION,
Respondent,

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, Trustee for Hassie Hunt Trust, PHILLIPS PETROLEUM COMPANY,
Intervenor-Respondents.

## BRIEF OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *AMICUS CURIAE*, IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI.

### Interest of *Amicus Curiae*.

This brief is submitted on behalf of Public Service Electric and Gas Company, a public utility operating company

engaged in the manufacture and distribution of electricity and gas. It was organized July 25, 1924 under the laws of the State of New Jersey and has its principal and executive offices at 80 Park Place, Newark 1, New Jersey. It is authorized to do and does business only in the State of New Jersey. It serves gas to over 1,100,000 customers in an area having a population of more than 3,400,000 persons and which extends from the Hudson River opposite New York City to the Delaware River at Trenton and thence to a point south of Camden at Woodbury, New Jersey.

Public Service Electric and Gas Company is the largest contract customer of Transcontinental Gas Pipe Line Corporation and is presently authorized to purchase 169,000 Mcf of natural gas per day. Additionally, it purchases 119,000 Mcf per day from Texas Eastern Transmission Corporation and 25,000 Mcf per day from Tennessee Gas Transmission Company. These purchases are made under 20-year contracts.

Public Service Electric and Gas Company had participated fully before the Federal Power Commission and the courts, up to and including argument before this Court in *Atlantic Refining Company, et al.*, v. *Public Service Commission of the State of New York, et al.*, 360 US 378. This Court's opinion in that case, issued June 22, 1959, was generally considered to be a most significant ruling interpreting the Natural Gas Act with respect to the intent of Congress to protect the consumer of natural gas. Less than a month and a half later, on August 4, 1959, the United States Court of Appeals for the Third Circuit in the instant case, by a vote of two to one, affirmed the action of the Commission in issuing certificates of public convenience and necessity without condition where the facts and circumstances were substantially identical with those in the CATCO case. It is the position of Public Service Electric

and Gas Company that there is a direct conflict between the decision in the instant case and the decision of this Court in the CATCO case. Public Service Electric and Gas Company contends that if the decision of the Circuit Court of Appeals in this case is permitted to stand it will have the effect for all practical purposes of overruling the decision of this Court in the CATCO case. This is evident from an examination of certain orders of the Federal Power Commission adopted since August 4, 1959. In these orders the Commission, while referring to the CATCO case, has disregarded the strictures contained in the opinion of this Court therein and has issued certificates involving initial prices in excess of the CATCO price, relying on the decision by the Circuit Court of Appeals in the Transco-Seaboard case. *In the matters of Superior Oil Company, et al.*, Docket No. G-16,380, *Sun Oil Company, et al.*, Docket No. G-15,122, *et al.*, *Sunray Mid-Continent Oil Company*, Docket No. G-14,753, and *The California Company, et al.*, Docket No. G-16,108.

Public Service Electric and Gas Company believes that it represents the ultimate consumers—that is, its customers—and, because of the importance of the initial price issue herein and the frequency with which it will arise, the public interest requires a definitive ruling by this Court.

## ARGUMENT:

**Affirmance by the United States Court of Appeals for the Third Circuit of the Commission's order which failed to provide for the protection of consumers by appropriate use of its conditioning authority with respect to initial prices in producer certificate proceedings contravenes the principal purpose of the Natural Gas Act and is in conflict with this Court's CATCO decision.**

The decision below, issued August 4, 1959, is in conflict with this Court's CATCO decision, issued June 22, 1959, and the policy of the Natural Gas Act. It overlooks the fact that the purpose of the Act was to "* * * underwrite just and reasonable rates to the consumers of natural gas.", *Atlantic Refining Company, et al.* v. *Public Service Commission of the State of New York, et al.*, 360 U. S. 378. As this Court said at page 388:

> "* * * The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any 'proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity,' §7(e), 15 U. S. C. §717 f(e), and that all rates and charges 'made, demanded or received' shall be 'just and reasonable,' §4, 15 U. S. C. §717(c). * * *"

Further, at page 389, this Court said:

> "* * * The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in §5 of the Act, 15

U. S. C. §717d, which authorizes the Commission *sua sponte*, or otherwise, to institute an investigation into existing rates and charges and to fix them at a just and reasonable level. Under this section, however, the rate found by the Commission to be just and reasonable becomes effective prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a §5 proceeding.

"In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under §7 (e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in §5 proceedings through which initial certificated rates are reviewable appears nigh interminable. • • •"

The decision below does not afford consumers the complete, permanent and effective bond of protection from excessive rates and charges which Congress intended for them. Instead the Commission has granted permanent certificates without any price condition even though the initial prices are higher than the CATCO prices. The only remedy left to consumers is the right to apply for a Section 5 proceeding, which this Court has said in CATCO affords no protection from excessive charges collected during the pendency of the proceeding. P. 392.

If the Commisssion were to use its clearly established power to condition certificates with respect to initial prices to provide for refunds if found to be appropriate, the overriding intent of Congress to give full protective coverage, pricewise, to the consumer would be realized.' However, the failure of the Commission to exercise its power, as here, where the initial price, in excess of the CATCO price, signals the existence of a situation not in the public interest,

precludes the possibility of any refund to the consumers. The extent of the liability of the consumer to pay charges which later may be found to be excessive without any chance of recovering the excess cannot be accurately measured, but some idea of its magnitude can be seen from the fact that Transcontinental, the purchasing pipe line, subsequent to the issuance of the Commission's September 4, 1958 order, filed for an increase in its rates of 3.97¢ per Mcf on May 18, 1959 in Docket No. G-18, 783. The period of time the consumer will have to pay possible excessive charges is likewise indefinite, but we do know that the Section 5 proceedings in *Phillips Petroleum Company* v. *Wisconsin*, 347 US 672, have not been concluded despite the fact that the jurisdictional issue was decided by this Court on June 7, 1954. No other producer Section 5 case has as yet been decided. It is abundantly clear as this Court has stated in the CATCO case at page 390 that Congress did not intend that the producers should be provided with a windfall over a long period of time during which the consumer would not even have the protection of a refund possibility. The payment of rates subject to refund is itself a hardship, but the finality of payment with no hope of redress, never so intended by Congress, is intolerable. Public Service Electric and Gas Company, like other gas distribution companies on the Eastern Seaboard, has provisions in its filed tariff, the operation of which results in the automatic reimbursement to its customers of the full amount of any such refund.

The Court below arrived at a result contrary to that determined by this Court in the CATCO case because it decided that the initial price was not "out of line", that there was a "need" for the gas and that natural gas is less expensive than manufactured gas. These reasons, relied upon to distinguish the instant case from CATCO,

represent what might be called a "difference without a distinction". The initial price here, slightly in excess of the CATCO price, is based on and was the direct result of the CATCO price, which price itself has been remanded by this Court for further consideration by the Commission. The other two reasons, in fact, were present in the CATCO case to the same extent as in these proceedings. The three so-called distinguishing reasons advanced by the Court below, in no way relieve the Commission of its duty to so administer the Act, as to protect consumers against exploitation at the hands of natural gas companies, by providing for refunds or other equally effective safeguards, until the reasonableness of the initial prices may be established.

Public Service Electric and Gas Company respectfully urges this Court to grant a Writ of Certiorari herein because of the great public interest involved. The interpretation of the Court below of the purport and intent of this Court's CATCO decision if allowed to stand will cause the Federal Power Commission to continue to disregard the CATCO case and rely on the affirmance by the Court below of the Commission's order which was issued prior to the CATCO decision. If certiorari is not granted the practical effect will be to nullify the protection which we think this Court intended to insure consumers of natural gas by its decision in the CATCO case.

The result reached by the two-to-one decision of the Court below is so patently in direct conflict with the result reached by this Court, without dissent, in the CATCO case, as to require review by this Court in order to insure consumers a complete, permanent and effective bond of protection from excessive rates and charges.

## Conclusion.

It is respectfully submitted that the Petitions for a Writ of Certiorari should be granted.

Respectfully submitted,

EDWARD S. KIRBY,
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Electric and Gas Company.

WILLIAM H. BLAKE,
J. HARRY MULHERN,
Of Counsel.

October 23, 1959.

## Certificate of Service.

I, EDWARD S. KIRBY, attorney for *amicus curiae*, and a member of the bar of the Supreme Court of the United States, do hereby certify that I have served upon the Solicitor General of the United States and counsel of record for each other party a copy of the foregoing brief *amicus curiae*, in support of the petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit by depositing true and correct copies thereof in the United States mail, first class or air mail, where appropriate, postage prepaid, on October 23, 1959, addressed as follows:

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JAMES R. BROWNING, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1959

Nos. 459, 473

Public Service Commission of the State of New York, *Petitioner*,

*v.*

Federal Power Commission, *Respondent*.

The United Gas Improvement Company, *Petitioner*,

Philadelphia Electric Company, *Petitioner*,

*v.*

Federal Power Commission, *Respondent*.

Pan American Petroleum Corporation, Atlantic Refining Company, Cities Service Production Company, Humble Oil & Refining Company, Ohio Oil Company, Oil Participations Incorporated, Tidewater Oil Company, Transcontinental Gas Pipe Line Corporation, Continental Oil Company, Magnolia Petroleum Company, Pure Oil Company, Sun Oil Company, Union Oil Company of California, W. H. Hunt, Trustee for Hassie Hunt Trust, Phillips Petroleum Company, *Intervenor Respondents*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

## Motion of People of the State of California and the Public Utilities Commission of the State of California for Leave to File Brief Amici Curiae

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# In the Supreme Court of the United States

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The United Gas Improvement Company, *Petitioner*,
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*v.*

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---

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

**Motion of People of the State of California and the Public Utilities Commission of the State of California for Leave to File Brief Amici Curiae**

---

The People of the State of California and the Public Utilities Commission of the State of California (created by Article XII of the California Constitution), through its Attorney and Chief Counsel, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, respectfully move for leave to file, in the above-entitled case, their brief amici curiae, annexed hereto, which supports the position of the petitioners herein.

The undersigned Attorney and Chief Counsel for the Public Utilities Commission of the State of California is charged with the duty and responsibility of representing and appearing for the People of the State of California and the Public Utilities Commission of said State in all matters concerned with public utility regulation (Section 307, California Public Utilities Code, formerly Section 4 of the Public Utilities Act).

Said Public Utilities Commission exercises exclusive jurisdiction over all public utility regulatory matters, including the regulation of rates and service of gas utilities furnishing either natural or manufactured gas to the consumers of California.

## THE INTEREST OF THE STATE OF CALIFORNIA

California is concerned with this cause. California gas distributing utilities serve a population in excess of 15 million people. Approximately seventy per cent of the natural gas utilized in California comes from out-of-state sources. Presently the sole out-of-state supplier of natural gas to California is the El Paso Natural Gas Company, which is subject to the jurisdiction of the Federal Power Commission.

Of direct concern to the public of California is the issue in this case relating to the imposition of price conditions attendant upon the issuance of a certificate of public convenience and necessity by the Federal Power Commission. The interest of California in an adequate supply of natural gas at a just and reasonable price has been the subject of administrative litigation by this Commission over many years before the Federal Power Commission. Our problems are real, not academic.

## PROPOSED PROJECTS TO CALIFORNIA

California's population and industrial growth require annual additions of natural gas from out-of-state sources. Presently three pipeline projects are in various stages before the Federal Power Commission. To demonstrate the absolute necessity for restoring meaning on behalf of consumers to the original CATCO decision, we shall here discuss briefly the natural gas pipelines which are proposed to be constructed to supply natural gas to California.

### Transwestern Pipeline Company.[1]

The Federal Power Commission has authorized Transwestern Pipeline Company of Houston, Texas, to construct a new $191,700,000 system in the southwestern United States to supply 300,000,000 cubic feet of natural gas daily to markets in Southern California.

### The Rock Springs Project.[2]

The El Paso Natural Gas Company proposes to build and has made application to construct a pipeline from the State of Utah to the Southern California border, at a cost of $77,896,000, to deliver 470,000,000 cubic feet of natural gas daily to the California market.

### The Pacific Gas Transmission Company.[3]

The Pacific Gas Transmission Company has made application to the Federal Power Commission to construct

1. *In the Matter of Transwestern Pipeline Company, et al.*, Docket No. G-14871 Federal Power Commission.

2. *In the Matters of El Paso Natural Gas Company, Pacific Northwest Pipeline Corporation, Colorado Interstate Gas Company*, Docket Nos. G-16235, et al. Federal Power Commission.

3. *In the Matters of Pacific Gas Transmission Co., Pacific Northwest Pipeline Corp., The Montana Power Co.*, Docket Nos. G-17350, et al. Federal Power Commission.

a pipeline from the Province of Alberta in Canada across the international border, through the States of Idaho, Washington, and Oregon, to the northern border of California. This proposed pipeline is designed initially to transport 414,000,000 cubic feet per day at a cost of $337,765,000.

The total investment in these projects is $697,361,000. The total gas supply delivered is 1,184,000,000 cubic feet per day. Presently California consumes so much natural gas that it has been stated that an increase of one cent per mcf. in the cost of imported gas increases the annual natural gas bill of California by approximately $7,000,000.

The interest of California in this proceeding is vital. We are submitting this brief on behalf of California consumers to urge that the Supreme Court re-assert what we conceive to have been its intention in enunciating the CATCO doctrine.

Respectfully submitted,

WILLIAM M. BENNETT
*Chief Counsel*
*Attorney for the People of the State of California and the Public Utilities Commission of said State*

# In the Supreme Court of the United States

OCTOBER TERM, 1959

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Nos. 459, 473

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Public Service Commission of the State of New York, *Petitioner*,

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The United Gas Improvement Company, *Petitioner*,

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Federal Power Commission, *Respondent*.

Pan American Petroleum Corporation, Atlantic Refining Company, Cities Service Production Company, Humble Oil & Refining Company, Ohio Oil Company, Oil Participations Incorporated, Tidewater Oil Company, Transcontinental Gas Pipe Line Corporation, Continental Oil Company, Magnolia Petroleum Company, Pure Oil Company, Sun Oil Company, Union Oil Company of California, W. H. Hunt, Trustee for Hassie Hunt Trust, Phillips Petroleum Company, *Intervenor-Respondents*.

---

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

## Brief Amici Curiae on Behalf of the People of the State of California and the Public Utilities Commission of the State of California

---

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit

**Brief Amici Curiae on Behalf of the People of the State of California and the Public Utilities Commission of the State of California**

## STATEMENT OF INTEREST

The interest of the People of the State of California and the Public Utilities Commission of said State in this cause is fully set forth in the motion preceding this brief.

## OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit, concerning which review is sought, is not yet reported. The opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's

order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

## JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1959. An order denying rehearing was entered on September 9, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1952) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b) (1958 ed.).

## QUESTIONS PRESENTED

1. Whether the requirement for "a most careful scrutiny and responsible reaction to initial price proposals of producers"* was satisfied in a certificate proceeding under Section 7 of the Natural Gas Act, in which the Federal Power Commission required no justification of the producers' initial prices but relied instead on the purchases having been made at "arms length," at the top of current unregulated market prices, by a pipeline which needed the gas for purposes of its own expansion and passed on the increased costs by raising its rates?

2. Whether the Commission's authority to issue conditioned certificates is circumscribed by its ability to determine, in the certificate proceeding, the reasonableness of a conditioned rate?

3. Whether a determination made by the Commission that producer certificates should issue without condition before enunciation by this Court of the requirement set forth in 1, above, necessitated reconsideration by the Commission in the light of that decision, or whether the Court below could itself make the reconsideration?

---

*Atlantic Refining Co., et al. v. Public Service Commission of the State of New York, 360 U.S. 378, 391 (1959), hereinafter referred to as the CATCO decision.

## STATUTE INVOLVED

Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w (1958 ed.).

## STATEMENT

The State of California adopts as its statement that which appears in the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit as filed by the United Gas Improvement Company and the Philadelphia Electric Company, petitioners herein.

## SUMMARY OF ARGUMENT

The question here presented is whether or not the Circuit Court construed correctly the decision of this Court in the Atlantic Refining Company case. It is the opinion of the amici that the Court placed an improper, narrow construction upon the CATCO decision. It is the opinion of the amici that the Circuit Court opinion has, for practical purposes, destroyed the beneficial effect of the CATCO decision. It is the opinion of the amici that the Supreme Court in the CATCO case was enunciating a policy which required more than a consideration and rejection by the Federal Power Commission of the price factor.

## ARGUMENT

The United States Court of Appeals for the Third Circuit in the instant decision concerning which review is sought did not correctly apply the CATCO doctrine. In the CATCO decision the Supreme Court admonished the Federal Power Commission to decide certificate cases after giving careful consideration to the question of price. It placed the question of price squarely within the concept of public interest. The Court pointed out that the Natural Gas

Act furnishes a comprehensive and effective regulatory scheme. The Court in the CATCO decision noted that without a price condition, rates later determined to have been excessive have been paid beyond recall by the public.

The total meaning of the CATCO decision, as we read it, requires more than full consideration and rejection of the price factor. As we read CATCO, it makes mandatory a price condition if, under any reading of the record, the public interest would be adversely affected by not inserting such. We also wish to point out to this Court that the public interest and necessity for price protection are never defeated by the contention that the gas must be sold or acquired at any price—else it will be lost. Obviously, this latter line of reasoning would destroy any or all price conditions if logically pursued.

**A Discussion of the Decision of the Court of Appeals for the Third Circuit.**

Factually, there is a great similarity between the record made before the Federal Power Commission which was the subject of the opinion by the Court of Appeals for the Third Circuit and the record before the Commission in the CATCO case. In CATCO, the authorized price created a new price level. In the present case the trial examiner found "that these prices are materially higher than the levels involved in Transco's prior purchases or existing contracts."

Despite many issues or factual matters having a similarity between the two cases, the Circuit Court construed the CATCO decision as merely requiring agency consideration of the price factor. We are quick to point out, however, that while it certainly requires full consideration of the price factor, it requires full consideration in the light of the public interest and in the light of what is just and

reasonable under the Natural Gas Act. The lower court has chosen to equate the administrative duty to that of a court of equity. This is an inexact comparison. It is not valid.

The vast responsibility of this agency; the public need for natural gas; the pipeline investments; the producer problems; the national dependence upon this valuable natural resource all of these factors make this somewhat more than an unspecified problem in a court of equity. Historically and beyond dispute, the Natural Gas Act was passed to protect consumers from exploitation. The question of prices is inseparable from the problem of exploitation. This agency in the public interest is required to apply the public interest as a first standard, and its duty is more articulate than the Circuit Court indicated when it described the administrative determination as involving "an exercise of judgment."

The exercise of judgment which is dictated by the Natural Gas Act and by the decisions of this Court is more specific than appears in the present decision. We submit that the instant decision is incorrect as a matter of law, whether viewed from the language of the Supreme Court in the CATCO decision or whether judged in light of the standards of the Natural Gas Act and the court decisions construing it.

This cause should be remanded to the Federal Power Commission for further consideration. Circuit Judge Hastie in his dissenting opinion stated:

> "Certainly the Atlantic Refining case indicates an approach and emphasizes considerations which might well have led the Commission to a different result, with or without further inquiry as to reasonable rates, in the cases now before us. To me that conclusion is a sufficient reason for sending these cases back to the Commission for re-examination."

In the CATCO decision, the Supreme Court stated that price was a "consideration of prime importance." This language means more than was attributed to it by the lower court opinion. In practical effect and operation, unless the instant decision is clarified, the CATCO decision, so far as consumer interest is concerned, loses all meaning. The protections we thought had been re-asserted by the Supreme Court have now been rationalized into a nullity, and perhaps consumers are worse off than if CATCO had never been decided. As the Circuit Court opinion now construes the Natural Gas Act and the question of price, as it affects the public interest, any administrative determination as to price is proper and lawful—or will be held such on appeal—so long as the agency, through suitable findings, makes it known that it gave some consideration to price.

## CONCLUSION

We submit that price inevitably is a key issue in certificate cases. The fact that the Natural Gas Act does not permit reparations is a cogent argument in favor of price conditioning. The continued expansion of natural gas facilities and particularly as it affects California consumers, requires that price protections be imposed. Absent a modification or clarification of the instant decision, price controls, practically speaking, no longer exist except at the largesse of the agency. We submit that the Natural Gas Act makes mandatory, the imposition of price controls in the instant case.

Respectfully submitted,

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**Certificate of Service**

I hereby certify that I have this day served the foregoing document upon the following parties by the United States mails, air mail, postage prepaid.

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1959**

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## Nos. 459, 473

---

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

*Petitioner,*

*v.*

FEDERAL POWER COMMISSION, ET AL.,

*Respondent*

---

THE UNITED GAS IMPROVEMENT COMPANY, PHILADELPHIA ELECTRIC COMPANY,

*Petitioners,*

*v.*

FEDERAL POWER COMMISSION, ET AL.,

*Respondent*

---

ON PETITONS FOR WRITS OF CERTIORAI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

**BRIEF AMICI CURIAE OF THE MEMBER MUNICIPALITIES OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, IN SUPPORT.**

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See inside front cover

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---

### Opinions Below

The opinion of the United States Court of Appeals is not yet reported. (See decision printed in Petition of Public Service Commission of the State of New York, Appendix

A; at pp. A-1 to A-7, dissenting opinion at pp. A-7 to A-8, the judgment of the Court at p. A-9, and the order of the Court denying rehearing at p. A-10. The opinion of the Federal Power Commission (R. 481-556) is reported at 20 F.P.C. 264.

## Jurisdiction

The asserted grounds for jurisdiction are set forth in the Petitions of Public Service Commission of the State of New York and the other Petitioners.

## Question Presented

Did the United States Court of Appeals err in failing to remand this case to the Federal Power Commission in light of the case of *Atlantic Refining Company v. Public Service Commission of the State of New York*, 360 U.S. 378.

## Statutes Involved

The applicable provisions of the Natural Gas Act, June 24, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.* are printed at pages B-1 to B-4 in Appendix B of the Petition of Public Service Commission of the State of New York.

## Interest of Amici Curiae

The National Institute of Municipal Law Officers (NIMLO) is an organization composed of more than eleven hundred (1100) municipalities located in each of the 50 states, the District of Columbia and in the territory of Puerto Rico. The cities which encompass this membership act through their chief legal officers, who are designated as the City Attorney, City Solicitor, Corporation Counsel, Director of Law and so forth.

This brief is filed pursuant to Rule 42(4) of this Court. The members of NIMLO are political subdivisions of states and this brief is sponsored by their authorized law officers.

The members of NIMLO have been constantly intent upon assuring adequate and complete regulation of natural gas, pursuant to the mandate of the Congress when it enacted the Natural Gas Act of 1938 (sometimes hereinafter referred to as the "Act."). In fact, the members of NIMLO were among the sponsors of the Natural Gas Act when it was adopted. The member cities were represented by brief *amici curiae* in the case of *Oklahoma Natural Gas Company* v. *Federal Power Commission*, cert. granted 358 U.S. 877, cert. dismissed, 358 U.S. 948, which was a companion case to the case of *Atlantic Refining Company* v. *Public Service Commission of the State of New York*, 360 U.S. 378 (hereinafter sometimes referred to as the "*Catco*" case), but was dismissed on motion of the petitioner. This Court, however, rendered a decision in the *Catco* case, bearing upon a similar proposition as that which was included in the *Oklahoma Natural* case and since the issue involved in the instant case vitally affects every municipality in the United States which purchases natural gas for its own consumption, or whose residents are consumers of natural gas, this brief *amici curiae* is filed in support of a grant of certiorai and a reversal of the decision of the Court of Appeals.

## Statement of Facts

The statement of facts is set forth by Petitioners and will not be repeated herein.

## Argument

In the *Catco* case this Court held that the purpose of the Natural Gas Act was to "underwrite just and reason-

able rates to the consumer", 360 U.S. 388. This is, of course, in keeping with the accepted principle enunciated by this Court in the cases of *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U.S. 591, 610, 611-612, and *Phillips Petroleum Company* v. *State of Wisconsin, City of Detroit et al*, 347 U.S. 672, 685, that the primary aim of the Natural Gas Act was protection of consumers against exploitation at the hands of natural gas companies. The decision of the Court of Appeals, however, has breached the protection afforded consumers in the Natural Gas Act by erroneously interpreting this Court's *Catco* decision.

As in *Catco*, the instant case is one involving the grant of certificates of public convenience and necessity under Section 7 of the Natural Gas Act. The Federal Power Commission (hereinafter sometimes referred to as FPC) granted these certificates to the producers involved without conditioning the proposed prices to be charged by the producers to the pipeline purchaser. The prices which were certificated by the FPC were excessive. As this Court held in the *Phillips* case,[1] the regulation of rates charged for all wholesales of natural gas for resale in interstate commerce was the intent of the act. It is not reasonable to regulate one segment of an industry and leave another segment free to charge whatever the market will bear. Prices charged by producers are passed along to the ultimate consumer by virtue of the fact that the interstate pipe line companies and the distribution companies include these prices in the rates which are charged the consumers. Thus, unless there is effective regulation of the *initial* price charged by the producer there can be no adequate protection for the ultimate consumer—the individual for

[1] *Supra*, 347 U.S. 682-683.

whose benefit the Congress passed the Natural Gas Act. This unassailable proposition was recognized by this Court in the *Catco* decision.

However, in the face of the *Catco* decision, the Court of Appeals failed to follow the dictate of this Court by attempting to distinguish the case away and by relying upon factors which this Court never indicated were sufficient to support a decision as rendered by the FPC. The FPC held that evidence of an existing market for the sales at the price proposed and of economic feasibility was sufficient evidence to support the issue of permanent certificates unless there is evidence contrary to show that the prices are unreasonable and would adversely affect the public interest (R. 10,345-10,346). This Court however, has enunciated that the price to be charged by a producer is a "consideration of prime importance" (360 U.S. 391) in determing whether certificates should issue. The Commission thus acted in a manner contrary to that which is required by the *Catco* decision.

The Commission rendered its decision in the instant case prior to the time a decision was rendered by this Court in the *Catco* case and herein lies the paramount reason why this Court should grant certiorai and remand the case to the Federal Power Commission for the taking of further evidence. As Judge Hastie stated in his dissenting opinion:

> ". . . it seems appropriate to ask whether the Commission would have proceeded in the way it did and reached the result it reached here, had the subsequent teaching of the *Atlantic Refining* case then been before it.
>
> Certainly the *Atlantic Refining* case indicates an approach and emphasizes considerations which might well have led the Commission to a different result . . ."

(Petition of Public Service Commission of New York, App. A, pp. A-7, A-8)

The criteria employed by the FPC in the instant case were held to be insufficient by this Court in *Catco*. It is the duty of the FPC to examine the justness and reasonableness of a proposed rate and in particular where the initial rate of a producer in a certificate proceeding is involved. Commissioner Connole, in his dissenting opinions in decisions rendered by the FPC prior to *Catco*, profoundly set forth the reasons why the initial rate of a producer is so all important. In the *Superior Oil*[2] case he stated:

> "This proceeding is but another turn of the wheel. Once again a buyer has to meet the highest price being paid by any other pipeline if it hopes to do business with the producer involved. *And once again the opportunity to brake the headlong rush is lost.*" (Emphasis supplied)

This Court in *Catco* designated what is to be done in order to brake this headlong rush of spiralling prices. The Court of Appeals has refused to follow the decision in that case and has therefore erred. Should this decision be permitted to stand, exploitation of the consumer is inevitable.

[2] Re the Superior Oil Company, FPC Docket No. G-12121, decided May 9, 1958, 23 PUR 3d 331.

## Conclusion

For the foregoing reasons the petitions for a writ of certiorari should be granted.

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I, J. Parker Connor, attorney for *amicus curiae* hereby certify that I have this day served upon the following-named parties a copy of the foregoing brief *amicus curiae* by depositing true and correct copies thereof in the United States mail, first class, postage prepaid, and airmail, postage prepaid, addressed as follows:

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

## No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Petitioner,*

v.

FEDERAL POWER COMMISSION, ET AL.,

*Respondents*

## No. 473

THE UNITED GAS IMPROVEMENT COMPANY, PHILADELPHIA ELECTRIC COMPANY,

*Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL.,

*Respondents*

---

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE ALABAMA LEAGUE OF MUNICIPALITIES, AND BRIEF.**

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## MOTION OF THE ALABAMA LEAGUE OF MUNICIPALITIES FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Alabama League of Municipalities, an association composed of two hundred fifty-five (255) incorporated cities

and towns in the State of Alabama, respectfully files this Motion for Leave to file an Amicus Curiae Brief in support of Petitions for Certiorari in causes No. 459 and No. 473 on the docket of this Court. In support of such motion movant respectfully shows:

1. Consent has been obtained from Petitioners, The United Gas Improvement Company, Philadelphia Electric Company and the Public Service Commission of the State of New York for the filing of such brief; but, although requested to do so, the respondents which have answered the request have refused to agree that it may be filed.

2. The issue involved in the instant case relates to the prices charged for natural gas by producers to pipeline companies and the duty of the Federal Power Commission to assure that such prices are just and reasonable at the time the Commission issues a certificate of public convenience and necessity to the producers to make a sale of natural gas. If the prices of the producer to the pipeline company are not just and reasonable, then this price perforce is paid by the consumer because the pipeline company passes it on to the distribution company which in turn must pass it on to the consumer.

3. The movant is an organization composed of 255 municipalities, which include thousands of consumers who must rely upon natural gas to heat their homes, cook their food and so forth. Thus, movant should be permitted to present the viewpoint of the consumers since it is these consumers who will ultimately pay any unjust or unreasonable charges for natural gas.

4. For these reasons movant believes that they have a very real and relevant interest in this case, insofar as the questions presented in the petitions for certiorari are concerned.

WHEREFORE, it is respectfully moved that this motion to file a brief *Amicus Curiae* be granted and the brief, in the form attached be received.

ALABAMA LEAGUE OF MUNICIPALITIES.

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IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1959**

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## No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Petitioner,*

*v.*

FEDERAL POWER COMMISSION, ET AL.,

*Respondents*

---

## No. 473

THE UNITED GAS IMPROVEMENT COMPANY, PHILADELPHIA ELECTRIC COMPANY,

*Petitioners,*

*v.*

FEDERAL POWER COMMISSION, ET AL.,

*Respondents*

---

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

## BRIEF AMICUS CURIAE OF THE ALABAMA LEAGUE OF MUNICIPALITIES

### Opinions Below

The opinion of the United States Court of Appeals is not yet reported, (see decision printed in Petitions of the New York Public Service Commission (No. 459) as Appendix A,

pp. 1-8; and The United Gas Improvement Company and Philadelphia Electric Company (No. 473) as Appendix A, pp. 18-25). The opinion of the Federal Power Commission (R.481-555) is reported at 20 FPC 264 (1958); the Commission's order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

## Jurisdiction

The asserted grounds for jurisdiction are set forth in the Petitions of the New York Public Service Commission and The United Gas Improvement Company and Philadelphia Electric Company.

## Questions Presented

The questions are presented in the Petitions of the New York Public Service Commission and The United Gas Improvement Company and Philadelphia Electric Company.

## Statutes Involved

The applicable provisions of the Natural Gas Act, June 24, 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, are printed at pp. 28-34 in Appendix B of the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

## Interest of Amicus Curiae

The Alabama League of Municipalities is an association composed of two hundred fifty five (255) incorporated cities and towns in the state of Alabama.

This brief is filed pursuant to Rule 42 of this Court.

The issues presented by the instant case vitally affect every municipality in the United States which purchases natural gas for its own consumption, or whose residents are

consumers of natural gas. If price regulation is not effectively provided at the Federal level, local regulation of gas rates is seriously hampered. The principal purpose of the Natural Gas Act was to prevent such a regulatory gap.

The League's interest *amicus curiae* in the instant case arises from the fact that the judgment of the Court below, if not promptly corrected in this Court, will substantially impair the principles established by the recent decision of this Court in *Atlantic Refining Co., et al. v. Public Service Commission of the State of New York*, 360 U.S. 378 (1959).

This decision, together with the decision in *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672 (1954) are of fundamental importance to the gas consumer. *The Phillips* decision held that the Federal Power Commission has jurisdiction to regulate the rates of producers for sales of natural gas for resale in interstate commerce; the *Atlantic Refining* case provides a very necessary supplement to that decision, holding that rates for new field sales of gas subject to the Commission's regulatory control, must be supported by evidence showing their necessity to the present and future public interest, and must be subjected to a "most careful scrutiny and responsible reaction" by the Commission before being unconditionally imbedded in the natural gas pricing structure.

The requirements laid down in *Atlantic Refining* have a very practical significance to gas consumers in Alabama. A large part of their supply comes from Southern Natural Gas Company (Southern), although other pipelines, including Transcontinental Gas Pipe Line Corporation (Transco), the pipeline purchaser in the instant case, also provide natural gas service in the state of Alabama. Prior to this Court's decision in *Atlantic Refining*, the Commission authorized producers in the southern Louisiana area to sell substantial volumes of gas to Southern, at prices of

22.8 cents per Mcf, in an uncontested, "short-form" proceeding. *Southern Natural Gas Co.*, 19 FPC 558 (1959). It observed casually in passing:

> "These proposed prices will be among the highest to be paid for natural gas in the southern Louisiana area." 19 FPC at 559.

After this Court's *Atlantic Refining* decision, the Commission has once again authorized, over the protest of its own Staff, new sales to Southern from the south Louisiana area and Mississippi at prices up to 23.7 cents including taxes.[1] This time the Commission did hold a hearing. It concluded, however, that since the initial price proposals were not "out-of-line" with others certificated by it before *Atlantic Refining* (at a time when its practice was to make no rate scrutiny in certificate proceedings), they should be made effective without further study.

To meet the increased costs of purchasing gas, Southern has filed two substantial rate increases since 1957.[2] If the decision of the Court below is left undisturbed as a precedent which permits the Commission to continue the authorization of new sales without requiring evidentiary support for the initial price levels proposed, the benefit of *Atlantic Refining* to consumers, including those represented here by the League, will be nullified. Each time Southern needs more gas its costs and rates will go up again, with no explanation of the "reason why" (360 U.S. at 393) such higher prices are required. The League is therefore vitally

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[1] South Georgia Natural Gas Co., Docket No. G-9892, Opinion No. 325, issued August 7, 1959. The Commission lost no time in citing the decision of the Court below in this case, issued three days earlier, to support its position (Opinion No. 325, mimeo. ed., p. 13).

[2] FPC Docket Nos. G-13,258 and G-18,512. Docket No. G-13,258, involved an annual increase of some $18 million, of which approximately $11 million was allowed in a Commission-approved settlement. Docket No. G-18,512 now pending, increases Southern's rates by about $10 million a year.

interested in seeing that the *Atlantic Refining* decision be reaffirmed by reversing the lower court's misinterpretation of it.

## ARGUMENT

In this case the Court below has affirmed an order of the Federal Power Commission unconditionally authorizing new sales from south Louisiana at prices above those involved in the *Atlantic Refining* case, in which the Commission: (a) did not require producers to demonstrate that their initial price proposals were required by the present and future public convenience and necessity (see footnote 5, R.485); (b) held that consumer interests challenging such rates were required not only to demonstrate their unreasonableness, and that they had an adverse effect on the public interest, but also to prove the reasonableness of any alternative price proposal (R. 486 and 491); (c) failed to specify what criteria it used in determining whether there was "an adverse effect on the public" and concluded that a two-cent pipeline increase which resulted from unconditional authorization of the producer prices was not such an adverse effect (R.489); (d) expressed doubt as to the Commission's authority to impose an initial price condition (R.491-2); and (e) expressly stated that in any event it would not exercise its authority to act as a price administrator for the natural gas production industry (R. 493).

In approving this decision, the Court below was doubly in error. First of all, it disregarded this Court's mandate to the Commission in *Atlantic Refining* that initial price proposals "must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued," and the requirement that such proposals be subject to "a most careful scrutiny and responsible reaction." (360 U.S. at 391). Secondly, it applied an erroneous standard of judicial review by affirming an unreasoned administrative

decision, arrived at under a basic misapprehension of the law, and not supported by substantial evidence as to a vital element (price justification) which had to be considered.

Either error presents questions which justify the granting of the Writ in this case. The rapid increases in natural gas price levels on and offshore Louisiana (and in other areas), without any regulatory scrutiny as to their reasonableness, and without even a requirement by the Commission that at least part of the new higher price levels be charged conditionally, subject to refund whenever the rates are finally evaluated, has exposed gas consumers to substantial increases, which are now irretrievable. Unless this Court acts now, the unsound principle will be established that arms-length bargaining between a pipeline-purchaser which needs more gas to sell more gas and which can pass on increased cost of obtaining it to consumers, and a producer-seller which understandably extracts the top "market" price as determined by other non-regulated prices, is sufficient to support a finding that "the present and future public convenience and necessity" requires unconditional authorization of such sales. Without further guidance by this Court, the Commission will continue, without substantial deviation, its practice before the *Atlantic Refining* case; "arms-length" bargaining will be substituted for regulation and the consumer will continue to stand bare of any price protection. Whatever price the Commission finally approves on remand of the *Atlantic Refining* case will be of little concern to anyone except those immediately involved, because the large-volume sales at prices of 23.5 cents per Mcf authorized in these proceedings will establish the "market" level.

The failure of the Court to exercise a proper scope of review is of equal importance. Whether affirming or reversing an agency's decision, it is important that appellate courts not intrude on the areas entrusted by Congress to the

judgment of the administrative body. By evaluating the result reached rather than the underlying decisional process, the Court below has left unchallenged an agency decision which clearly conflicts in several important respects with a recent decision of this Court on the same general question. It is not surprising therefore that subsequent agency decisions likewise reflect a confused and erroneous application of this Court's decision, leading only to further litigation. In view of the heavy burden of administrative appeals in recent years, it is essential that courts devote their scrutiny to the reasons invoked by an agency and whether its findings have a rational basis in law and are supported by substantial evidence, rather than making their own evaluation of the record to determine whether the agency's conclusions, reached after unarticulated consideration and "weighing of all factors" is "not unreasonable." (See the decision of the Court below, Petition for a Writ of Certiorari Filed by the New York Public Service Commission, App. A-6). Otherwise judicial review becomes the same as another administrative appeal, and policies Congress intended to entrust to guidance by administrative agencies will instead be formulated by the courts. Moreover, effective administration of the Natural Gas Act, at this time "when ground rules of producer regulation are being evolved" makes it imperative for the Commission to issue reasoned decisions, arrived at upon a rational basis and supported by evidence, rather than making the bare statement that it has "weighed all factors" and arrived at a result.

The Alabama League of Municipalities files this brief *amicus curiae* urging that the petitions for certiorari be granted in this case because the decision of this Court in *Atlantic Refining* is a landmark case, of the utmost importance to all consumers of natural gas wherever situated in continental United States. Because it jeopardizes the re-

quirements that initial prices be subject to "careful scrutiny" and be supported by evidence of their necessity to the present and future public convenience and necessity, the decision of the Court of Appeals in the instant case has an importance far beyond the confines of this case, and we respectfully submit that the petitions for certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

No. 473

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*
PHILADELPHIA ELECTRIC COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*

**Brief of Pan American Petroleum Corporation, The Atlantic Refining Company, Cities Service Production Company, Humble Oil and Refining Company, The Ohio Oil Company, Continental Oil Company, Socony Mobil Oil Company, Inc. (Successor by Merger to Magnolia Petroleum Company), The Pure Oil Company, Union Oil Company of California, W. H. Hunt, Trustee for Hassie Hunt Trust and Phillips Petroleum Company, Respondents, in Opposition to Petitions for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## OPINIONS BELOW

The orders of the Federal Power Commission (R. 481-556, 602-610) are reported at 20 F.P.C. 264 and

571.[1] The majority opinion of the Court of Appeals for the Third Circuit and the dissenting opinion (Pet., Public Service Commission of the State of New York, App. A-1-A-8;[1] Pet., The United Gas Improvement Company and Philadelphia Electric Company, pp. 18-25)[2] are reported at 269 F. 2d 865.

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petitions filed herein.

## QUESTION PRESENTED

The evidence of record in a proceeding before the Federal Power Commission under Sections 7(c) and (e) of the Natural Gas Act established, *inter alia*, (a) an urgent need of distribution company customers of Transcontinental Gas Pipe Line Corporation for additional direct daily deliveries of 173,634 Mcf and additional daily deliveries from storage of 191,000 Mcf; (b) savings of millions of dollars which will accrue to ultimate consumers, occasioned by reduction of operating costs due solely to additional supplies of natural gas proposed to be sold by independent gas producers to Transcontinental; and (c) that no new pricing pattern or plateau would be established by the proposed prices in the producer sales contracts. The Federal Power Commission issued Certificates of Public Convenience and Necessity to the producers authorizing sales of natural gas to Transcontinental at agreed-

[1] Reference to the Petition of Public Service Commission of the State of New York will be as follows: (Pet. N.Y., p. ).

[2] Reference to the Petition of the United Gas Improvement Company and Philadelphia Electric Company will be as follows: (Pet. UGI, p. ).

upon contract prices. The question presented is whether the court below properly held that, in the circumstances presented, the Commission did not err as a matter of law in issuing such Certificates.

## STATUTE INVOLVED

The applicable portions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 USC §§ 717-717w, are set forth at pages 28 through 34 in the Appendix to the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

## STATEMENT

Review is sought of the judgment of the Court of Appeals for the Third Circuit, affirming an Opinion and Order of the Federal Power Commission (Commission), which issued to Transcontinental Gas Pipe Line Corporation (Transcontinental) and to independent producers Certificates of Public Convenience and Necessity authorizing the sale of natural gas to Transcontinental, without attaching to the producer certificates a condition with respect to the initial prices to be charged.

Transcontinental, which owns and operates a natural gas pipeline system extending from Texas to New York, filed applications to effect its largest expansion program, estimated to cost in excess of $167,000,000. Distribution company customers of Transcontinental were to be supplied an additional 173,634 Mcf of natural gas daily and ten existing customers were to receive an additional 191,000 Mcf of natural gas daily from storage facilities. The proposed source of the natural gas to supply such increased deliveries was under sales

contracts of 26 independent producers, all of whom filed appropriate applications for certificates to effect such sales. The total volumes of natural gas proposed to be sold to Transcontinental pursuant to such contracts were approximately two trillion cubic feet (2,000,000,000,000 cubic feet), to be produced and sold from newly developed leases in south Louisiana and adjacent offshore areas.

The pipeline and producer applications were initially set for a consolidated hearing. Subsequent to presentation by Transcontinental of its direct case, the Commission, on March 28, 1958, upon motion of Transcontinental, which was unopposed by any participant or intervenor, severed the independent producer applications and fixed a separate date for hearing such applications (R. 372-382) before the same Presiding Examiner. Petitioners participated in all hearings. Subsequently, as Commission Regulations advise participants (18 C.F.R. 157.23(b)), the Commission considered the entire record in these inter-related proceedings and entered its single Opinion and Order based thereon.

Witnesses for Philadelphia Electric Company (Philadelphia), The United Gas Improvement Company (UGI),[3] Long Island Lighting Company (Long Island), Brooklyn Union Gas Company (Brooklyn Union) and Brooklyn Borough Gas Company (Brooklyn Borough)[4] testified as to their requirements for additional natural gas and described savings to be

[3] Philadelphia and UGI are Petitioners in No. 473.

[4] Long Island, Brooklyn Union and Brooklyn Borough are distribution companies whose rates are regulated by the Public Service Commission of the State of New York. Petitioner in No. 459.

achieved through reduction in costs that would accrue to them and to their consumers if the certificates were granted and the additional natural gas made available to them. The savings to which these witnesses testified would exceed $11,000,000 per year by 1962, and, cumulatively, amount to more than $30,000,000 through 1962 (R. 613, 226; 228-229, 236-241, 256-257).[3] Other distribution companies and municipalities presented witnesses who testified as to their additional gas requirements (R. 227-228, 232, 234-236, 240-241, 243-246, 248-250, 254, 258, 260-261). Alternative sources were available to satisfy these additional requirements, but the proposal involved in these proceedings was the most economical means of meeting such requirements.

The producers and Transcontinental had entered into long term contracts of 20 years or more at initial prices ranging from 21 cents to 22 cents per Mcf, exclusive of tax reimbursement, if any (R. 302-303). Transcontinental was not under any compulsion to purchase this gas (R. 118-119) and could have purchased its gas requirements elsewhere upon terms less favorable to the ultimate consumer (R. 13-14). The prices provided in the contracts were not out of line with the prices under other contracts in the areas (R. 13-15, 77, 79, 116-118), and were substantially lower than for sales under comparable intrastate con-

[3] Philadelphia would effect a reduction in costs of $2,454,581 by the end of 1959 (R. 240-241). UGI would save $262,000 in fiscal year 1959-1960 (R. 256). Brooklyn Union would save $682,965 in 1959, $3,218,704 in 1960, $5,798,639 in 1961 and $7,552,756 in 1962 (R. 613, 229). Brooklyn Borough would save $39,000 by 1962 (R. 228). Long Island, which proposed to secure an additional 25,000 Mcf of firm gas per day, will save $29,000 per year for each additional 1,000 Mcf of firm gas it purchases from Transcontinental (R. 237).

tracts in the area (R. 128-129). There was no corporate affiliation between buyer and any seller and negotiations were conducted at arm's-length, without any duress or undue influence, each party standing upon the strict letter of his rights. The applicants were willing and able to perform the acts proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder (R. 29-39, 41-42, 43-50, 56, 64, 77, 82, 92-93, 96, 101, 104-105, 107-111).

New York, Philadelphia, UGI, and the other intervenors did not present any evidence in the proceedings except as noted above. This uncontradicted evidence reflects solely the benefits that would accrue to them and to consumers. Petitioners before this Court, thus admit the urgent need of the distribution company customers of Transcontinental for additional gas supplies and that millions of dollars will be saved for the benefit of ultimate consumers by reduction of operating costs, due solely to use in the respective distribution systems of the additional natural gas proposed to be purchased by Transcontinental.

Upon consideration of the entire record, the Commission, on September 4, 1958, entered its Opinion and Order issuing certificates to the producers without conditions as to price and, in a lengthy decision, set forth its findings, reasoning, and conclusions (R. 481-524). The Commission, by a 4-1 vote, denied petitions for rehearing (R. 602-610).

Upon review, the court below, after consideration of briefs, oral argument, supplemental briefs and a memorandum concerning the Opinion of this Court in *The Atlantic Refining Company, et al.* v. *Public Service*

*Commission of the State of New York, et al.*, 360 U.S. 378 (1959),[6] held that the Opinion and Order of the Commission reflected consideration of all of the elements necessary under Sections 7(c) and (e) of the Natural Gas Act to proper disposition of the applications and that there was substantial evidence to support the findings and conclusions of the Commission (Pet. N.Y., App. A-7).

Having reviewed the entire record and "with the text of the Supreme Court opinion" before it, the court held that the "weighing of the factors and the conclusion to be reached is a task for the Commission," that the necessary elements had been considered by the Commission, and, that the conclusion reached by the Commission was "not unreasonable." Judgment was, accordingly, entered affirming the Opinion and Order of the Commission. Circuit Judge Hastie, not challenging the correctness of the result reached by the Commission, would, nevertheless, have remanded the proceeding to the Commission for reconsideration in light of the Opinion of this Court in CATCO.

Petitions for Rehearing filed by Petitioners were considered by Judges Goodrich, Kalodner, Staley and Hastie, a majority of the judges for the Third Circuit and all of the judges who sat in CATCO and in this case. The Petitions for Rehearing were denied unanimously.

## ARGUMENT

There is no necessity or occasion for this Court to review the judgment of the court below. The court adhered strictly to well-settled principles of court agency relationship; it analyzed the record before

[6] Hereafter referred to as "CATCO"

the Commission; it reviewed the action of the Commission in light of established principles of law; and, particularly important here, it made such review and analysis in light of this Court's Decision in CATCO, and found the Commission Opinion and Order to be in accord with all requirements of Section 7 of the Act and the substantial evidence rule.

The court, in its opinion below, said:

> "Since the case was submitted to this Court the Supreme Court has affirmed us in a case referred to by the parties as 'CATCO'. *We proceed in this case, therefore, with the text of the Supreme Court opinion before us.* The Court affirmed the Third Circuit in sending that case back to the Commission for further hearing. The grounds upon which the majority rested its decision differed from those relied upon by this Court and *we shall, of course, keep our eye on the Supreme Court opinion rather than our own.*" (Pet. N.Y., App. pp. A-3, 4) (Emphasis added, footnotes omitted).

Unlike the court, Petitioners misread the holding and misinterpret the language of this Court in CATCO. Petitioners ignore this Court's clear pronouncement regarding the relationship of the "just and reasonable" rate standard of Sections 4 and 5 and the "public convenience and necessity" standard of Section 7. Petitioners recognize that this Court determined that the evidence of record in CATCO did not satisfy the requirement for "substantial evidence" to support the specific findings and conclusions of the Commission in that case. Petitioners, however, erroneously assert that this Court also held that, as a matter of law, the sales there involved could never be certificated without a condition as to price in any proceeding under Sections 7(c) and (e).

Inherent in Petitioners' argument is the erroneous assumption that, as a matter of law, any other sale, in any other field, regardless of the circumstances, based upon a contract providing for a price as high as or higher than that involved in CATCO could never be certificated without a condition as to price being imposed. Under this reasoning, administrative discretion and the Commission's statutory functions under Section 7 must disappear, and a specific price in cents (¢) per Mcf becomes for all time the only price that, as a matter of law, meets the requirements of public convenience and necessity. Obviously, such assumption is contrary to law.

The court below correctly read CATCO. The court concluded that, unlike CATCO, the evidence in this case was sufficient to prove that the prices involved were not "out of line," and that the Commission had so found. The court concluded, from an examination of the evidence, that "these new prices do not establish 'a new price plateau in the southern Louisiana shopping area' ", and that, "There can be little doubt that the Transco contract prices actually represent the market price for natural gas in the area." The same conclusion had been reached by the Examiner (R. 417) and by the Commission (R. 489). The court also considered whether, under the criteria of Section 7, certification would have any adverse effect upon consumers. It concluded, as had the Commission (R. 495), that the effects would be beneficial (Pet. N.Y., p. A 6). Any other conclusion could not be reached in view of the millions of dollars in savings that would accrue as a direct result of the increased supply of natural gas to Transco's customers and to the consumers they serve. The court further concluded, "Finally, there

was evidence in this case that the increased supply of natural gas would effect cost savings to Transco's customers who otherwise would be required to manufacture gas themselves at a higher unit cost in order to satisfy expanding consumer demand for gas."[7]

Thus, the court below, fully cognizant of the Opinion in CATCO, reviewed the action of the Commission and the entire record upon which the Commission's Opinion and Order was based. After a careful review of the principles of law which the Commission had followed, buttressed by searching appraisal of the Opinion in CATCO, the court properly held that, as a matter of law, issuance of the certificates to the producers without a condition as to price was not unreasonable. Consistent with its functions under Section 19(b) of the Act, the court concluded that it could not hold that the evidence of record was insufficient "to support a finding of Public Convenience and Necessity prerequisite to the issuance of the permanent certificates." Cf. CATCO, 360 U.S. at 393-4.

The case, thus, raises no questions of interpretation of Section 7 of the Act that have not been decided uniformly by the courts of appeals and this Court, and there is no occasion for delay of finality of certification of this project for further weighing of voluminous evidence already carefully considered by the Commission and the court below.

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[7] New York cannot ignore this tremendous cost saving, nor eliminate from the record the probative and entirely voluntary evidence of distribution company customers (many of whom are subject to New York's regulatory jurisdiction) of the substantial benefits that would inure to them; which was offered by them for the purpose of urging certification.

I

**The court below correctly interpreted the CATCO Opinion and correctly concluded that the Commission considered all factors and that the evidence supports its findings and conclusions.**

An examination of the opinion of the court below emphasizes the care with which that court kept its "eye" on CATCO.

The court recognized that the Act does not require determination of a "just and reasonable" rate in a Section 7(c) proceeding. The Court of Appeals for the District of Columbia Circuit had held in *Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634 (D.C. Cir. 1958) on May 22, 1958, more than three months prior to the Commission Opinion and Order in these proceedings, and, as this Court later held in CATCO, that a "just and reasonable" hearing, as is contemplated by Sections 4 and 5 of the Act, is not a prerequisite to issuance of a Certificate of Public Convenience and Necessity. The court was also fully cognizant of those factors which this Court stated the Commission should consider in determining public convenience and necessity in proceedings under Sections 7(c) and (e) of the Act.

The main thrust of Petitioners' assertions of error by the court below is that the court "misinterpreted" and "misconstrued" the Opinion of this Court in CATCO. It is Petitioners, however, who not only misinterpret CATCO but also misapply established principles of court-agency relationship. The arguments presented by Petitioners are premised upon many obvious misstatements regarding the action of the court and regarding the evidence of record, most

of which relate only to questions of weight to be accorded various facets of a voluminous record."

Contrary to Petitioners' assertions, the court was aware that, as in any other administrative proceeding, proper and full consideration of *all* factors and evidence of record relative thereto is a vital part of the initial certification process (Pet. N.Y., A-7). Upon examination of the entire record, the court found that the Commission did give consideration to *all* the evidence of record to determine whether, having regard for those factors which necessarily reflect an economic impact upon the consumer, public convenience and necessity required certification of the sales as proposed.

The court below examined the evidence of need that this Court found lacking in CATCO. It pointed out that "Transco's customers called for more gas than Transco was able from its then sources to supply" and said, "That there is a large and immediate need for more gas in the territory served by Transco was fully developed in the testimony and made the subject

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[8] For example, Petitioners erroneously assert that the court below looked only to "need" and "market value" (Pet., UGI, p. 9; Pet., N.Y. p. 13); that the court has left in doubt the scope of the power to attach to a certificate a condition as to price (Pet., UGI, p. 13); that "market prices" have been used as a criterion by which to measure the statutory standard of public convenience and necessity (Pet. UGI, p. 10); that the court has held that where there is "need" arm's-length bargaining is sufficient price justification (Pet. UGI, p. 11); that the court below did not consider the scope and extent of the Commission's authority to issue "conditioned certificates" (Pet. UGI, p. 14); that the court chose to "substitute its judgment" for that of the Commission (Pet. UGI, p. 16); that there is not one word of testimony that a single distribution company would manufacture additional gas in excess of present send outs (Pet. N.Y., p. 19) and, that expansion of service by a distribution company can only result in increases in gas distribution company costs (Pet. N.Y., p. 20).

of findings by the Commission." (Pet. N.Y., A-4). The court then detailed some of the evidence upon which such findings were made. It pointed to the evidence presented by Transco's customers, including Petitioners UGI and Philadelphia, other distribution company customers under the regulatory jurisdiction of Petitioner New York, and others. The court then concluded, "In sum, these gas companies, serving local consumers, attested with facts and figures to the increased consumer demand for gas, their inability to satisfy that demand from existing supplies and the desirability of purchasing increased quantities of natural gas rather than undertaking the more expensive task of expanding facilities and producing manufactured gas." (Pet. N.Y., A-4, 5).

In so concluding, the court below also recognized that the Commission did give consideration to whether the initial contracts will create a new pricing pattern in south Louisiana; whether such initial price will become, in effect, a floor for future gas sales contracts in such area; whether the initial price will cause a general price rise; and whether the initial price will cause an increased price to be paid under the seller's or purchaser's existing contracts. Substantial evidence regarding these factors was shown on the record and fully considered in the Commission Opinion and Order.

This Court has never held, nor has it even suggested, that the Commission or any other administrative agency is to be restricted to an arbitrary consideration of only a portion of the evidence.[9] It has always ad-

[9] To the contrary see *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951).

hered to the principle of law that an agency is required to consider *all* the evidence adduced of record and to weigh *all* relevant and material factors which pertain to the complex by which the statutory standard of "public convenience and necessity" is measured. Where, as here, the evidence of record, considered in its entirety, establishes, among other advantages, that the proposed sales do not disrupt general price levels and will, in fact, provide substantial financial and economic benefits to ultimate consumers, issuance of certificates as applied for cannot be held to be erroneous as a matter of law.

Petitioners' assertions of error, coupled with alleged "uncertainty" regarding the "relationship between the 'just and reasonable' rate standards of the Act and its certificate provisions," completely disregard the clear and unequivocal language of this Court that: "It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates" (360 U.S. at 390-1).

Petitioners this attempt to rely upon an asserted principle of law which has already been passed upon and rejected by this Court in CATCO, and by the Court of Appeals in *Oklahoma Natural Gas Co. v. FPC, supra.*

Petitioners wholly misconceive the law. This Court has *not* undertaken to declare, as a matter of law, a ceiling above which a price is not consistent with the standard of public convenience and necessity. Determination of such administrative conclusion has been

delegated to and is a function of the Commission. When a conclusion made by the Commission is supported by the substantial evidence of record in a given proceeding, Section 19(b) provides that it shall not be set aside.[10]

Petitioners necessarily assume that, when this Court remanded the CATCO certificate proceeding, it prescribed, by judicial decree, a contract price ceiling above which the Commission may *not* certificate a sale by another producer, from another field, to another purchaser, without attaching a condition as to price, regardless of the evidence in the proceeding. Such assumptions are not only contrary to the precise holding of this Court in CATCO, but also are contrary to the entire body of law.

Petitioners and others have also referred to other certificate matters decided by or pending before the Commission.[11] Each of those proceedings necessarily presents widely differing fact patterns. In each of those proceedings the Commission must exercise its statutory function of weighing the evidence and determining whether the proposals meet the public convenience and necessity standard. As participants in these proceedings, Petitioners and others may, of course, urge their views on those matters before the Commission, and, if Petitioners consider themselves aggrieved by a final order of the Commission, they

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[10] *Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D.C. Cir. 1958), *cert. den.* 356 U.S. 959 (1958); *Michigan Consol. Gas Co.* v. *FPC*, 246 F.2d 904 (3rd Cir. 1957), *cert. den.*, 355 U.S. 894 (1957); *Signal Oil and Gas Co.* v. *FPC*, 238 F. 2d 771 (3rd Cir. 1956), *cert. den.*, 353 U.S. 923 (1957).

[11] See Pet. N.Y., pp. 26-27; Pet. Util. p. 12; Brief Amicus Curiae of Pa. P.U.C., p. 9.

may seek review thereof under Section 19(b) of the Act. Obviously, a myriad of facts is involved in each proceeding, and the instant case cannot be a vehicle for determination of whether various other projects are required by public convenience and necessity; neither can those cases be determinative of the merits of this proceeding. This case was decided and reviewed upon its own merits. Necessarily, each Commission action in the various proceedings cited by Petitioners must be decided upon its own merits.

The court has recognized, as did this Court, that Congress, in the Natural Gas Act, has not proscribed permanent certification without condition merely because there is evidence of increased gas purchase costs, or merely because the proposed price is in excess of a pre-existing contract price to the same purchaser. The Commission is free, as it must be, to consider all facts or factors relevant to determination of public convenience and necessity.[12] What this Court has held is that Congress has proscribed permanent certification where the evidence of record establishes or indicates little more than the sale of natural gas to a pipeline at substantially increased costs to the ultimate consumers. The facts here are to the contrary.

The Opinion below, thus, evidences a proper interpretation of this Court's holding, and, rather than create "uncertainty," is wholly consistent with judicial construction of Section 7 of the Act.

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[12] *The Atlantic Refining Company, et al. v. Public Service Commission of the State of New York, et al.*, 360 U.S. 378 (1959); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *National Coal Ass'n v. FPC*, 191 F. 2d 462 (D.C. Cir. 1951).

## II

**The court below did not depart from established principles of law controlling judicial review of an order of an administrative agency**

Petitioners also claim the careful review by the court below was a "significant departure from accepted practice in the field of administrative law." (Pet. UGI, p. 14). But they do not and cannot establish such claim.

At the time the Commission acted, it followed principles of law which had *already* been spelled out clearly in the *Signal* case as to the scope of its authority to condition initial prices under Section 7, and in the *Oklahoma Natural Gas Company* case as to the necessary dichotomy between the public convenience and necessity standard of Section 7 and the "just and reasonable" rate standard of Sections 4 and 5 of the Act. Principles and precedents under the Act, binding upon the Commission, were not left "unsettled" or "uncertain" and were not changed by CATCO. The Commission was fully cognizant of the judicial constructions which had identified guideposts of its area of discretion, and was fully cognizant of the long-settled requirement that substantial evidence must be a foundation for findings and an ultimate conclusion that a project is not required by the public convenience and necessity.

The unreality of Petitioners' characterization of the Commission's actions (Pet. UGI, p. 15; Pet. N.Y., pp. 3-27) is demonstrated by reference to the Commission's opinion. All that Petitioners now allege the Commission failed to consider, *was* carefully consid

ered. Referring to the decisions of the courts,[13] the Commission noted that ". . . the prevalent standard in determining whether a requested authorization should be granted under Section 7(e), is not a rigid absolute of unchanging content, to be mechanically applied regardless of the wide diversity of facts presented by different cases" (R. 487). Unlike the Examiner, the Commission did not view the "price question as 'latent,'" but determined that the "issue" was "presently" before it (R. 489). The Commission then proceeded to review, in detail, the evidence presented. Reference was made to the impracticability of applying "within the confines of a certificate proceeding" a "cost-of-service formula" used under Sections 4 and 5 of the Act. The Commission then considered price levels, price ranges in the area of production, the impact upon the pipeline and ultimate consumers, the supply-demand situation, the peak-day deficiency the pipeline would experience this winter without the new supply, prices of alternative supplies, and the host of other facts adduced in a voluminous record (R. 489-491). Price was, of course, a "consideration of prime importance," and, with ". . . recognition of the rapidly fluctuating factors characteristic of the evolution . . ." of the industry and ". . . of the corresponding requirement that the administrative process" must "possess sufficient flexibility to adjust itself to these factors . . .",[14] the Commission properly exercised its statutory function under Section 7.

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[13] *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *National Coal Ass'n* v. *FPC*, 191 F. 2d 462 (D.C. Cir. 1951); *Scripps-Howard Radio, Inc.* v. *FCC*, 189 F. 2d 677 (D.C. Cir. 1951).

[14] R. 487 (footnote 6).

Upon review, the Court of Appeals exercised its statutory function under Section 19(b) with equal care. The Court referred to the precedents established by the *Signal* and *Oklahoma Natural Gas Company* cases under which the Commission had proceeded. In addition, the court reviewed the Opinion in *CATCO* as it related to the principles of law the Commission had applied. Correctly, as reference to *CATCO* demonstrates, the court concluded that the precedents of *Signal* and *Oklahoma Natural Gas Company* had not been changed.

The court further considered this Court's application in *CATCO* of the "substantial evidence" rule and, this Court's references to the fact pattern which had been before the Commission in the *CATCO* case. With the extensive record, the lengthy Commission findings, and carefully detailed Opinion before it, the court concluded that in this case the Commission had indeed considered "all factors bearing upon the public interest." As in all review of administrative decisions, the court recognized that a *de novo* weighing of these factors and final decision by the court itself as to the public convenience and necessity would be a transgression into the administrative realm. The court found that the Commission had "correctly apprehended and properly applied the law," and, unlike the CATCO situation, its findings and conclusions *were* based upon substantial evidence.

Clearly, the principle of *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and related cases cited by Petitioners (Pet. UGI, p. 16), has not been violated. The principle of those cases *was* followed, but would have been violated *if* the court had done what Petitioners

seek substituted judgment as to the weight of the evidence,[15] or affirmed the Commission on grounds other than those upon which the Commission had relied.

Finally, Petitioners' suggestion that the court leaves in doubt the scope of the power of the Commission to attach to a certificate a condition as to price is simply contrary to the fact. The court stated, "We have said in the *Signal* case that the Commission could make its certificate conditioned upon a price limitation. We did not say that it must" (Pet. UGI, p. 20). To assure completeness of its analysis of the power of conditioning, and referring to CATCO, the court specifically stated that "We proceed in this case, therefore, with the text of the Supreme Court opinion before us." The scope of the power to condition is set forth at length in the opinion of this Court.

The judgment of the court below, thus, is the result of adherence by it to well-established principles of law. The Court of Appeals properly held that there was substantial evidence to support the findings and conclusions made by the Commission, and upon which it based its Opinion and Order.

The record does reflect that the Commission did, in fact, consider those factors and elements embraced by the Section 7 statutory standard of public convenience and necessity. The court properly refused to determine whether, in all the circumstances, the Commission could have reached some other conclusion or could have

[15] It should be noted that the Petition filed by the Public Service Commission of the State of New York in No. 459, in addition to including matters *de hors* the record, consists almost entirely of argument upon the weight of the evidence. (See N.Y. Pet., pp. 3-4 n. 12, 27).

entered some other order which would have been more satisfactory to Petitioners.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals does not present any issue of law which merits this Court issuing a writ of certiorari, and that the Petitions for a Writ of Certiorari should be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 470

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*,

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

No. 473

THE UNITED GAS IMPROVEMENT COMPANY, *Petitioner*,
PHILADELPHIA ELECTRIC COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents*.

## BRIEF OF SUN OIL COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## BRIEF OF SUN OIL COMPANY IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

### OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 269 F. 2d 865 and is printed in Appendix A, pp. A-1—A-8 to the petition for a writ of certiorari of the Public Service

Commission of the State of New York[1] and in Appendix A, pp. 18-25, of the petition for a writ of certiorari of The United Gas Improvement Company and Philadelphia Electric Company.[2] The opinion, the dissenting opinion and the order of the Federal Power Commission of September 4, 1958, issuing certificates of public convenience and necessity, affirmed by the Court of Appeals, are reported at 20 FPC 264 (R. 481-556). The Commission's order denying applications for rehearing is reported at 20 FPC 571 (R. 602-610).

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered August 4, 1959 (PSC Pet., App. A, p. A-9; UGI Pet., App. A, pp. 26-27). The petition of the Public Service Commission of New York was filed on October 9, 1959. The petition of The United Gas Improvement Company (UGI) and Philadelphia Electric Company (Philadelphia Electric) was filed on October 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b).

## QUESTION PRESENTED

Whether the decision and judgment of the United States Court of Appeals for the Third Circuit affirming an order of the Federal Power Commission issuing certificates of public convenience and necessity without price conditions for the sale of natural gas are in accord with the requirements of the Natural Gas Act?

[1] Referred to hereinafter as "PSC Pet."

[2] Referred to hereinafter as "UGI Pet."

## STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. §§ 717-717w, are set forth in Appendix B of the Petition of UGI and Philadelphia Electric (App. B, pp. 28-34).

## STATEMENT

Sun Oil Company (Sun) was granted two of the thirty-eight certificates of public convenience and necessity issued by the Federal Power Commission's order of September 4, 1958. Sun was an Intervenor-Respondent in the proceedings before the United States Court of Appeals for the Third Circuit, and is named as a Respondent in each of the petitions for a writ of certiorari in Nos. 459 and 473.

Sun does not believe that the issue raised by petitioners requires a counter-statement of the case, although Sun does not agree with many of the conclusions and inferences of the petitioners as set forth in the statements in the petitions. The *only* issue before the Court below was whether it was "an abuse of discretion for the Commission to grant these certificates without conditioning them as to price" (269 F. 2d at 867). In considering the decision of the Court below, however, it is appropriate, we believe, to draw to this Honorable Court's attention a finding from the Commission's order of September 4, 1958 which set forth a general description of the nature of the sales and facilities certificated, some of the factors the Commission considered in determining that producer certificates should be issued without price conditions and the method used in weighing the various factors considered by the Commission:

"* * * A whole expansion program, the largest proposed by Transco since the pipeline commenced operations, is involved in these proceedings—a program of which the distributing companies are the chief beneficiaries. The record shows the urgent need for the supplies of gas this program would make available to meet Transco's resale gas system requirements commencing with the coming winter. Transco states that to limit it to paying 17 cents for gas would prevent the company's acquiring any new gas, would prevent its further expansion and would remove hope of meeting the increased demands of its customers and their consumers for natural gas. Without this gas, Transco will experience a peak day deficiency next winter of 117,000 Mcf in meeting such requirements which will increase to 171,000 Mcf by 1961. Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere. In our judgment, a consideration of all the factors giving to each its appropriate weight can lead only to the conclusion that public convenience and necessity requires the certification of the producer sales at the initial prices proposed, a conclusion further fortified by the additional considerations discussed in connection with the parties' exceptions, *infra*, pp. 273-274." (20 FPC 264, 271-2)

## ARGUMENT

The Court below reviewed the Commission's order of September 4, 1958, and found the Commission had considered all necessary factors and that the Commission's ultimate conclusion was not unreasonable (269 F. 2d at 869). Additionally, the Court below after review found that the Commission's order met the requirements of this Court's decision in *The Atlantic Refining Co. v. Public Service Commission of the State of New York*, 360 U.S. 378 (hereinafter re

ferred to as the *Catco* decision). (269 F. 2d at 867-869). In essence, as will be demonstrated hereinafter, petitioners are asking this Court again to weigh the factors considered by the Commission and the Court below and hold that the Commission's conclusion is unreasonable.

Initially it seems appropriate to point out that the Court below noted that "the factual background is wide" although the subject litigated is a narrow one (269 F. 2d at 867). Thus it appears that the Court below considered it necessary to discuss in detail only the factors specifically put in issue by the petitioners before that Court and the matters specifically referred to in this Court's *Catco* decision, namely, initial price and need for the certificated sales and facilities.

The Court below, after referring to this Court's *Catco* decision, stated that it "proceed[ed] in this case, therefore, with the text of the Supreme Court opinion [in *Catco*] before us" (269 F. 2d at 867). As to the requirements of the *Catco* decision, the Court below noted first that in the *Catco* decision this Court pointed out a lack of need for the gas supply involved in that proceeding. As to need in this proceeding the Court found "That there is a large and immediate need for more gas in the territory served by Transco [which] was fully developed in the testimony and made the subject of findings by the Commission." (269 F. 2d at 868).

The Court below, then pointed out that this Court in its *Catco* decision "emphasizes strongly that attention must be given the price factor", and that the Court below must consider "whether the attention given to the subject of price to be paid for the gas

was sufficient" and whether the Commission's conclusion with respect thereto is reasonable. The Court concluded, after a review of the evidence and findings, that the necessary elements have been considered and that the conclusion reached is not unreasonable (269 F. 2d at 868, 869). Additionally, the Court noted that this Court stated in *Catco* that " 'the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5.' 360 U.S. at page 390, 79 S. Ct. at page 1254. It did require 'careful scrutiny and responsible reaction to initial price proposals of producers under § 7.' 360 U.S. at page 391, 79 S. Ct. at page 1255. It also recognized that § 7 requires the Commission to 'evaluate all factors bearing on the public interest.' Ibid." (269 F. 2d at 869). The Court below also concluded that the Commission had considered the necessary elements and that the conclusions reached by the Commission were not unreasonable (269 F. 2d at 869).

It is also apparent from the Commission's decision that it recognized "price" as a central issue in the case (20 FPC at 273). The Commission's decision also shows conclusively that the Commission carefully scrutinized the initial price, reflected and considered the results of granting the certificates without price conditions, and after weighing all factors against such results, concluded the certificates should be granted without price conditions (20 FPC 264, 270-274). As already stated, the Court below found the Commission had considered "the necessary elements" and reached a conclusion with respect thereto that was not unreasonable; and, in addition, the Court below reviewed this proceeding with this Court's *Catco* decision before it and determined the order should be affirmed. Under

these circumstances, there clearly was no basis or need for the Court below, or is there a basis or need for this Honorable Court, to remand the proceeding to the Commission for reappraisal under this Court's *Catco* decision as Petitioners, UGI and Philadelphia Electric, contend (UGI Pet. pp. 14-17).

Petitioners, UGI and Philadelphia Electric, argue without justification, that this Court's *Catco* decision requires producers to "justify" their prices (UGI Pet. pp. 8-13). Exactly what "price justification" encompasses these petitioners do not make clear. They admit the term does not require a full-scale producer rate determination, but state "price justification" contemplates a "factual showing that the producer's asking price reflects its actual economic needs." Petitioners cite as their authority for this alleged requirement Footnote 10, R. 419, of the Presiding Examiner's decision issued June 17, 1958. The Presiding Examiner there uses the term "economic status," as the relationship between "income in excess of cost," and "profit" to the seller. Obviously these petitioners are still contending that producers must make a factual showing that the prices are "just and reasonable," the criterion for determining rates under §§ 4 and 5 of the Natural Gas Act which this Honorable Court held is inapplicable in its *Catco* decision.

In contending that the Court below "apparently concluded" the factors of "need," "agreement to pay market prices," "arms-length bargaining," etc. can be substituted for the justification of initial rates, petitioners misconstrue the decision of the Court below (UGI Pet. pp. 9-11, See PSC Pet. pp. 13-15). As already set forth, petitioners have misconstrued this Court's *Catco* decision as to the showing required with

respect to initial prices. However, neither the Court below nor the Commission used need or other factors in scrutinizing price proposals and reflecting the results thereof. Such factors as need, however, were weighed and balanced by the Commission against the results of the price proposals and the Court concluded that the Commission's final result from the weighing and balancing process is not unreasonable (269 F. 2d at 869; 20 FPC at 272). The arguments petitioners here make as to alleged harm that will result from granting the certificates without price conditions were also made to the Commission which weighed them in connection with the public benefit (20 FPC at 273-274). Petitioners again made these arguments to the Court below, and the Court concluded after a review of the evidence, including the evidence on the effect of granting the certificates without price conditions, that the Commission's conclusion was not unreasonable (269 F. 2d at 867, 868-9).

Petitioners' contention that the scope of the Commission's authority to issue certificates with price conditions becomes questionable under the Court of Appeals' decision is without merit. The Court noted specifically that it had said in the *Signal* case[3] that "the Commission could make its certificate conditioned upon a price limitation * * *" (269 F. 2d at 867). However, the Court below noted that it did not say in the *Signal* case that the Commission must issue a certificate with price conditions (269 F. 2d at 867). This Court in its *Catco* decision also pointed to the authority of the Commission under § 7(e) to condition

[3] *Signal Oil & Gas Co.* v. *Federal Power Commission*, 3rd Cir., 1956, 238 F. 2d 771 *certiorari* denied 1957, 353 U.S. 923, 77 S. Ct. 681, 1 L. Ed. 2d. 720.

certificates and stated that the Commission "might attach" conditions it believes necessary where "the proposed price is not in keeping with the public interest * * *" (360 U. S. at 391). Thus, the decision below does not in any way raise questions as to the scope of the Commission's authority to issue certificates conditioned as to price. Here, the price proposal was in keeping with the public interest.

The comparisons presented by Public Service Commission of New York with respect to proposed prices and other factors in the *Catco* case and in this proceeding do not, as that petitioner alleges, show a conflict between the Court's decision below and this Court's *Catco* decision. (PSC Pet. pp. 12-13). This Court did not conclude or decide that the initial prices in that case required the Commission to condition the certificates as to price. In effect, we believe that in *Catco* this Court held that there was insufficient evidence in the record to show that the Commission had carefully scrutinized the prices or that it had reflected a responsible reaction to the price proposals and that, as a result, it had failed to take into consideration and weigh all factors in reaching a proper determination with regard to price conditions. As we have shown, those deficiencies do not exist in this proceeding.

Other contentions made by petitioners, we respectfully submit, are also without merit. Our discussion above of specific contentions, we respectfully submit, shows that in essence petitioners are *only* requesting this Honorable Court to weigh the factors the Commission considered in reaching its result and which the Court of Appeals found was not unreasonable. Clearly this is not an issue which merits this Court issuing a writ of certiorari.

## CONCLUSION

For all the foregoing reasons we respectfully request the petitions be denied.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

No. 473

THE UNITED GAS IMPROVEMENT COMPANY, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

## BRIEF FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

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---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

---

## BRIEF FOR RESPONDENT TRANSCONTINENTAL GAS PIPE LINE CORPORATION IN OPPOSITION

---

### QUESTIONS PRESENTED

1. Is the record in *Atlantic Refining Co. et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959)[1] so identical with the record supporting the Federal Power Commission's order of September 4,

[1] Hereinafter sometimes referred to as the *Cato* decision.

1958 here under review[2] that the Court of Appeals (which itself had previously heard the *Catco* case and on the basis of that record reversed the Commission)[3] committed reversible error in here affirming the Commission?

2. Did the Federal Power Commission fail to give "a most careful scrutiny and responsible reaction to initial price proposals of producers"[4] where it was fully advised by substantial evidence of record (1) that the ultimate consumers served by the pipeline company needed over 160 million cubic feet per day of additional gas supply within 90 days of the Commission's final order, which requirements could not be served out of the pipeline company's old gas reserves; (2) that the pipeline company had to undertake and complete within ninety days an enormous construction program if it were to be able to attach the required new gas supplies and begin winter service within that time (Transco expended approximately $100,000,000 on authorized facilities in 1958); (3) that this construction period would be wiped out if any attempt was made to hold further hearings in the certificate proceedings regarding the proposed initial prices of the 26 separate and distinct independent producer companies involved; (4) that the pipeline company had

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[2] 20 FPC 264 (1958); R. 10,333. Hereinafter sometimes referred to as the *Transco-Seaboard* case, after the names of the pipeline company applicant in Docket No. G-13143 and the producer applicant in Docket No. G-13169. The decision of the Court below, affirming the Commission order of September 4, 1958, is identified as United Gas Improvement Company v. Federal Power Commission, 269 F. 2d 865 (3d Cir. 1959).

[3] Public Service Commission of New York v. Federal Power Commission, 257 F. 2d 717 (3d Cir. 1958).

[4] 360 U.S. 378, 391 (1959).

been unable to contract for new gas supplies at its old contract price; and (5) that the proposed producer prices would not establish a new price plateau?

## STATEMENT OF THE CASE

### 1. The Order Under Review and Its Consequences.

Under the order of the Federal Power Commission (Commission) which is before this Court for review, Transcontinental Gas Pipe Line Corporation (Transco) received authorization to expand its transmission facilities at an estimated cost of $147,000,000,[5] to undertake additional peak day sales of 176,515,000 cubic feet to its customers,[6] to provide a new storage service from the Leidy Storage Field in Pennsylvania of 191,000,000 cubic feet per day[7] and to develop the Leidy Storage Field for this purpose in cooperation with two other companies.[8] The customers receiving the new service (including Petitioners in No. 473) are identified on Appendix A, hereto. The locations of the 970 miles of pipelines and 14,500 horsepower of compression authorized by this order are shown on the map which is Appendix B, hereto.

To provide the gas supply necessary for this project, 26 independent producers were authorized in 38 different dockets[9] to sell natural gas to Transco from

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[5] Docket Nos. G-13143, G-13590, G-13745, G-13793. This was Transco's *1958* expansion program. See footnote 19, *post*.

[6] Docket Nos. G-13590, G-13745. Also ten billion cubic feet per year to one customer.

[7] Docket No. G-13590.

[8] Docket No. G-13793.

[9] Docket Nos. G-13169, *et al.* The independent producer applicants are identified at R. 9757-9761. There were originally 39 applications; one was withdrawn. (R. 9758)

reserves estimated by the Commission to contain 2 trillion cubic feet of gas located in 25 different fields scattered over an area of South Louisiana and the Gulf of Mexico exceeding 15,000 square miles in extent. Petitioners are attacking in this Court only that part of the order of September 4, 1958 issuing certificates of public convenience and necessity to these producers.

Most of the 1958 construction season had passed by the time the Commission issued its order on September 4, 1958. However, by herculean effort Transco installed sufficient additional facilities during the remainder of 1958 to be able to initiate needed additional peak day winter deliveries of 167 million cubic feet per day to its customers during the first ten days of December, 1958, *ninety days after the Commission's order was issued.* Transco expended approximately $100,000,000 in constructing authorized facilities in 1958.

With the return of element weather in 1959, Transco continued construction of the authorized facilities. By November 1, 1959, Transco was providing service authorized by the order here under review to all but one customer;[10] had expended over $140,000,000 on authorized facilities, and had connected its pipeline system with 21 of the 25 fields[11] containing the estimated two trillion cubic feet of authorized additional gas supplies. In the meantime, these new gas reserves

[10] Service to New York State Natural Gas Corporation is not proposed to begin before January 1, 1960, as originally scheduled.

[11] Block 72, 113 and 20 fields located offshore Terrebonne Parish will not be connected to Transco's system until the summer of 1960 at the earliest. Habenville field, St. Charles Parish, has been abandoned because the gas reserves are insufficient to warrant construction of gathering facilities.

have come to play an additional vital role. By November 1, 1959, Transco had initiated additional peak day sales of almost 130 million cubic feet to its customers under authorization issued by the Commission in Docket No. G-16603, Transco's *1959* expansion program.[12] The customers receiving this new service are identified on Appendix C, hereto. *As the gas supplies from the 25 fields represent almost 25% of the total gas reserves contractually dedicated to Transco* (R. 5188), *the continuation of winter-time deliveries of 500 million cubic feet per day, initiated last winter and this November to millions of gas consumers from Alabama to New York City, is placed in jeopardy by Petitioners' efforts before this Court to reverse the Commission.*

In the event that this Court vitiates the certificates of public convenience and necessity issued by the Commission to the 26 different producers and remands these matters to the Commission, it seems clear that the producers in Blocks 72, 113 and 20 fields[13] will be under no obligation to make any sales to Transco from those fields except in accordance with their contracts.[14] It is not entirely clear that the producers who have already commenced service will be obliged to continue their present sales to Transco should the Commission ultimately issue certificates of public convenience and necessity to such producers containing terms and conditions substantially different from those set out in

[12] This service was first authorized by temporary orders of the Commission issued January 9, 1959 and October 16, 1959. Transco received final authorization by order issued November 17, 1959.

[13] See footnote 11, *supra*.

[14] Atlantic Refining Co. *et al.* v. Public Service Commission of New York, 360 U.S. 387, 388 (1959).

the certificates here under review and which have been accepted by the producers.[15]

**2. The Factual Background**

Transco is the pioneer supplier of natural gas to New York City. Its pipeline, constructed in 1949 and 1950, begins in south Texas, parallels the Gulf Coast to Alabama, then turns north along the eastern slopes of the Appalachians to its principal market in metropolitan New York, New Jersey and Philadelphia. See Appendix B, hereto. It supplies 66 utilities and municipalities at wholesale who in turn serve more than 20,000,000 gas consumers. While some of its customers have more than one source of natural gas,[16] Transco serves 55 wholesale customers (most of them small municipalities south of the Potomac River) who depend entirely upon Transco for their natural gas requirements. (R. 5287-5290)

Transco, for all practical purposes, has no production of its own.[17] It acquires its gas supplies from independent producers under long term contracts. The gas reserves involved in this appeal were contracted for in 1957 and early 1958. At that time, the only place where Transco could obtain substantial additional volumes of gas which its customers required was in its

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[15] *Ibid.*

[16] Among the customers which have at least two pipeline suppliers are the petitioners in No. 473, the four customers of Transco regulated by the New York Commission (petitioner in No. 459) in 1958 and the Public Service Company of New Jersey which has filed a brief herein in support of petitioners.

[17] The gas supplies produced by Transco from its own reserves in 1958 would have met the pipeline's requirements for about five hours.

south Louisiana "shopping area" which embraces the parishes in southern Louisiana between the Mississippi and Sabine Rivers and offshore areas in the Gulf of Mexico adjacent thereto. (R. 2627)

As early as the winter of 1956-1957 Transco had under consideration an expansion program to satisfy additional market requirements on its system of approximately 200,000,000 cubic feet per day in the winter of 1958-1959, and an additional 100-150,000,000 cubic feet per day in the winter of 1959-1960. (R. 2630) This was in no sense a market "created" by Transco. It simply was the anticipated demand for natural gas of millions of consumers.

Transco was unable to acquire additional gas reserves for this program at 17¢ per Mcf, the price in its earlier gas purchase contracts and the price which two of the petitioners[18] recommended be attached by the Commission as a condition to the independent producers' certificates. (R. 2630) This is not surprising because at least 120 contracts had been executed by various south Louisiana producers and other pipeline company purchasers in this area at prices in excess of 17¢ between November 1953 and July 29, 1957, the date on which Transco executed the first of the gas purchase contracts which are involved in this proceeding. (R. 2629; see also R. 6913-6926, 10,428).

Stalemated in its gas acquisition program, Transco was obliged to reconsider its gas purchase policy. After exhaustive study of the situation, the Company

[18] The New York Commission and The United Gas Improvement Company recommended 17¢. Philadelphia Electric Company recommended 9.79¢.

authorized its gas supply department to proceed to negotiate new gas purchase contracts at competitive levels in order to acquire reserves which would both satisfy the Company's anticipated additional market requirements during the subsequent two years and restore the pipeline's existing reserve inventory to a satisfactory level. (R. 2630)

Transco kept all of its major customers advised of its gas acquisition program and policy and of the fact that it had to raise the price it would offer for new gas reserves. (R. 2633)

Transco's expansion programs have followed a pattern over the past several years which was repeated in the case now before this Court. In the fall of the year Transco files the necessary certificate applications seeking authorization to expand its system capacity and to undertake new and enlarged service the following fall. Each annual program is identified by the year in which all or most of the facilities are to be constructed and the new service undertaken.[19] Assuming the Commission can hear and dispose of the

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[19] Transco has methodically expanded its system to meet the normal growth of the natural gas market which it serves:

| Progam | FPC Docket | FPC Authorization | Authorized Increase in Plant | Increase in Peak Day Service |
|---|---|---|---|---|
| 1955 | G-4185 | 14 FPC 1 | $ 48,205,000 | 92,722 Mcf |
| 1956 | G-10000 | 17 FPC 360 | $ 50,858,000 | 124,644 Mcf |
| 1957 | G-12059 | 18 FPC 710 | $ 51,600,000 | 114,078 Mcf |
| 1958 | G-13143 | 20 FPC 264 | $147,000,000 | 367,515 Mcf |
| 1959 | G-16503 | 22 FPC —* | $ 76,910,000* | 138,589 Mcf |
| 1960 | G-20107 | ** | $ 51,687,000** | 108,823 Mcf** |

* By order issued November 17, 1959, the Commission authorized Transco to undertake all of the proposed service and to construct approximately $53,000,000 of the proposed new facilities. The Commission severed for later decision the question of authorizing the balance of the proposed new plant.

** Filed with the Commission on November 12, 1959.

application by late spring (seven months after filing), this gives Transco only the summer and early fall for construction of required transmission facilities.

The filing date of the application is governed in large measure by the date by which the utility customers are able to specify the additional volumes they need, because substantial changes in market demands require re-engineering the project and recomputing its economics. The customers are asked at least 18 months before the new service is to begin how much additional gas they need. Understandably, the customers wish to defer the execution of precedent agreements relating to the additional service until the last minute because the new service will be provided under a twenty-year contract.

**3. The Proceedings Before the Commission**

In the case before this Court, which involves its *1958* expansion program, Transco filed its principal application with the Commission in October 1957.[20] (R. 7348-7738) The 39 independent producer applications upon which Transco relied were filed between August 1957 and February 1958.

As late as December 1957 some of Transco's customers had altered the volumes they desired from the expansion program. (R. 7957-7960) Transco was required to amend its project in January 1958 to reflect the last minute details of one of its customers' projects. (R. 8132-8542)

This left little time before construction had to begin. The expansion program required construction of more

[20] Docket No. G-13590. The application in Docket No. G-13143 which was filed earlier (August, 1957 involved gathering lines

than 970 miles of pipelines, 14,500 horsepower of compression and the development of a storage field. The total estimated cost was approximately $147,000,000.[21] (R. 3025) Transco advised the Commission that it needed authorization to commence construction by June 1, 1958 if it were to be ready by November 1, 1958 to begin the new service. (R. 473-479)

The Commission was then, as now, heavily burdened with a multitude of Section 4 and Section 5 rate cases,[22] and hundreds of other certificate applications. Beginning in December 1957, Transco and its customers urged the Commission to set the matter down for early hearing. (R. 7998, 8630) After hearings began on March 10, 1958, Transco and its customers urged the Presiding Examiner and the Commission to take all lawful measures to expedite the hearing and to issue an early order. (R. 267, 9038, 9498, 9605, 9665)

When it became evident that the hearings would not be completed in time, Transco applied for temporary authorization to commence the storage segment of its project.[23] (R. 9336, 9387, 9468) This was denied, apparently because of the questions being raised by the New York Commission, The United Gas Improvement Company (UGI) and Philadelphia Electric Company

[21] In its order of September 4, 1958 here under review, the Commission deferred consideration of other facilities estimated to cost an additional $20,000,000. (R. 10,371)

[22] Section 4 rate cases are entitled by law to preference over all other questions pending before the Commission. 15 U.S.C. § 717c.

[23] Docket No. G-13793 involved development of the storage pool. Docket No. G-13590 related, *inter alia*, to the transmission line to the pool.

(Philadelphia Electric) in Docket Nos. G-13169, *et al.*, as to the initial prices in the independent producer contracts. (R. 9598)

A full, complete and uncontroverted record was made before the Presiding Examiner demonstrating (1) the immediate need of Transco's customers for additional gas supplies commencing with the 1958-1959 heating season and (2) the fact that Transco could not provide such service without the additional gas supplies to be obtained from the 26 producer applicants. In contrast to the complete absence of evidence of market needs in *Catco*, in the instant case thirty-one witnesses testified in support of the market requirements of Transco's customers, utilizing 38 exhibits to support their testimony.

Transco's senior Production Engineer testified that without the additional gas reserves Transco would experience the following substantial peak day, annual and average day deficiencies in gas supply in meeting the requirements of its customers (all volumes in cubic feet at 14.73 psia) (R. 2694, 2695, 6909-6912):

| | 1959 | 1960 | 1961 |
|---|---|---|---|
| Peak Day | 116,800,000 | 159,400,000 | 171,200,000 |
| Annual | 8,162,000,000 | 24,899,000,000 | 23,081,000,000 |
| Average Day | 22,400,000 | 68,200,000 | 63,200,000 |

Each producer applicant presented a highly qualified witness to testify to the facts and circumstances surrounding the negotiation of the gas supply contracts. *Evidence as to comparative producer prices was placed in the record by several witnesses, including Transco's Vice President in charge of gas supply (R. 2628-2632, 2683, 2684) and a witness pre-*

*sented by the Staff of the Commission. (R. 6913-6928) The United Gas Improvement Company also presented producer price evidence, incorporating by reference hundreds of producer contracts on file with the Commission. (R. 2911-2952)*

The New York Commission and UGI proposed that a 17¢ initial price condition be attached to the independent producer certificates. Philadelphia Electric suggested an initial price condition of 9.79¢. *None of Transco's other 64 customers supported these price conditions.* (R. 10,350)

Transco opposed these conditions on several cogent grounds. The Commission lacks statutory power to requisition for Transco, or indeed any other market, uncommitted gas reserves in the field. Consequently, to support its 1958 and 1959 expansion programs Transco was obliged first to find a producer willing to enter into a contract to sell its uncommitted gas reserves and, as a condition of such contract, to file with the Commission the necessary application for a certificate of public convenience and necessity authorizing the sale. If the Commission substantially altered the terms and conditions of the producer contract, as would be the case if it attached 17¢ or 9.79¢ price conditions to the certificates of public convenience and necessity, Transco would not have the contractual right to demand that the independent producers accept such certificates, nor, on the other hand, could the Commission compel the producers to accept such certificates. Therefore, to attach 17¢ or 9.79¢ price conditions would result in the loss of this gas supply as the producers would turn to several other interstate pipeline companies which had been paying in excess

of 17¢ to producers in south Louisiana since 1953. (See R. 6913-6926, 10,428)

After careful consideration of the voluminous evidence of record and the arguments of counsel, the Presiding Examiner issued his initial decision in Docket Nos. G-13169, *et al.* on June 17, 1958 (R. 9751) and in Docket Nos. G-13143, *et al.* on July 9, 1958 (R. 9999). Oral argument before the Commission took place on August 1, 1958. The Commission recognized the need for an early disposition of the case (R. 10, 344):

> "For a number of reasons—among others, the importance of commencing Gulf Coast off-shore construction as soon as possible in view of the storm season, as well as the desire and need of Transco's customers for the additional service the company proposes during the coming winter if possible—it is important that we proceed expeditiously to final decision in this case. . . ."

As it was, after receiving Commission authorization on September 4, Transco only made the December 1, 1958 service date through the most strenuous efforts; putting on additional construction spreads and undertaking construction in the Gulf of Mexico offshore Louisiana in the teeth of the hurricanes.[24]

[24] Some of the construction barges used to install the pipeline to Block 76 Field, some 35 miles offshore Vermilion Parish, had to be abandoned by their crews on more than one occasion because of high winds and seas during the hurricane season. The devastation sometimes caused by Gulf hurricanes is a matter of public knowledge.

**4. The Proceedings Before the Court of Appeals**

Court review of the Commission's order of September 4, 1958 was jointly sought by UGI and Philadelphia Electric. Being beneficiaries of that order,[25] these petitioners singled out for attack only that part of the Commission's order of September 4, 1958 issuing certificates to the 26 independent producer applicants without the attachment of 17¢ (or 9.79¢) conditions. They ignored the fact that service to them depended on that gas supply, patently having no desire to cause Transco to terminate the additional sales to its customers, and gambling that the Court would take some action which would reverse the Commission and still leave the independent producers in a position where they would be obliged to continue sales to Transco.

The New York Commission was more logical. It argued that the Court of Appeals should not only nullify the certificates issued to the producers, because they did not have the 17¢ price condition attached, but also urged that the Court nullify two of the certificates[26] issued to Transco:

> "The propriety of the pipeline construction proposed by Transco in Docket Nos. G-13143 and G-13590 was entirely dependent upon its acquisi-

[25] Deliveries to Philadelphia Electric of an additional 10,000 Mcf per day began December 1, 1958. UGI received an additional 12,500 Mcf per day beginning December 10, 1958. Transco began injections in Leidy storage pool for the account of its customers in the summer of 1959. UGI has been allocated 5,000 Mcf per day of this storage service; Philadelphia Electric, 20,000 Mcf. See Appendix A, hereto.

[26] These certificates covered $130,000,000 of the authorized construction and all of the service authorized except that to Atlanta Gas Light Company.

tion of an additional adequate gas supply. Its acquisition of an additional adequate gas supply was, in turn, entirely dependent upon the issuance of certificates of public convience and necessity to the suppliers in Docket Nos. G-13169, *et al.* The certificates issued to the suppliers in the latter dockets are unlawful and therefore, petitioner herein requests that they be set aside. For that reason the issuance of certificates of public convenience and necessity to Transco in the related pipeline dockets was unlawful and should, similarly, be set aside."[27]

Delaware Power & Light Company, one of Transco's larger customers and wholly dependent upon Transco for its natural gas supply, unsuccessfully sought to intervene in the proceedings before the Court of Appeals in opposition to petitioners, arguing that their contentions were without merit, that petitioners' criticisms were aimed at the Commission and its failure to establish criteria for producer rates and that Transco stands to have its operations crippled as a by-product of petitioners' attack on the Commission.[28]

Petitioners advanced the same arguments before the Court of Appeals which they had employed without success before the Commission; revised and supplemented to reflect the decision of this Court in *Atlantic*

[27] Petition for Review filed by the New York Commission in the United States Court of Appeals for the Third Circuit, Public Service Commission of the State of New York v. Federal Power Commission, No. 12805, at page 11.

[28] It is significant that Consolidated Edison Company of New York, Inc., with over 1,000,000 gas customers, opposed the petitioners' efforts to attach similar price conditions to the producer certificates relating to Transco's 1959 Program in Docket No. G-16603. See Appendix C, hereto.

*Refining Co. et al.* v. *Public Service Commission of New York*, 360 U.S. 378 (1959).

The Court of Appeals, "with the text of the Supreme Court opinion before us", affirmed the Commission (Judge Hastie dissenting).[29] After briefly noting some of the aspects of this case, and without any effort to repeat all of the Commission's detailed findings, the Court concluded:[30]

> "The balancing of the weight to be given the various factors is not unlike that which a court of equity through the years has given in deciding whether an injunction is to issue in a case before it. It involves an exercise of judgment and the reasons which sway that exercise may be hard to articulate in a particular case.
>
> "The weighing of the factors and the conclusion to be reached is a task for the Commission. If the necessary elements have not been considered, the error is one of law and subject to court correction. If they have been considered and the conclusion reached is not unreasonable, the conclusion stands whether it is the one we should have reached or not. That, in our judgment, is the case here."

Petitioners applied to the Court of Appeals for rehearing, energetically restating their arguments in the light of this Court's decision in *Cateo*. On September 9, 1959 the Court of Appeals, "after due consideration" denied the petitions for rehearing.

[29] United Gas Improvement Company v. Federal Power Commission, 269 F. 2d 863 (3d Cir. 1959).

[30] 269 F. 2d at 869.

## REASONS FOR DENYING THE WRIT

### I

**CATCO IS NOT SUBSTANTIALLY IDENTICAL WITH THIS CASE, AND THE COURT OF APPEALS DID NOT COMMIT REVERSIBLE ERROR WHEN, "WITH THE TEXT OF THE SUPREME COURT OPINION" BEFORE IT, THE COURT REVIEWED PETITIONERS' CONTENTIONS IN THE LIGHT OF THE RECORD IN THIS CASE AND AFFIRMED THE COMMISSION.**

The same Court of Appeals which reversed the Commission in *Catco* was not persuaded, after careful consideration of this Court's decision, that *Catco* and this case are so identical in factual circumstances as to require reversal of the Commission in this case.[31] Concluding that all of the necessary elements had been considered by the Commission and that the conclusion reached is reasonable, the Court below refused to usurp the function of the Commission and affirmed the Commission's order.

Nothing signals so dramatically the difference between the two cases as the fact that the New York Commission has seen fit before this Court to materially alter the scope of its attack on the Commission's order, striving to "construct" a common ground between *Catco* and this case where such does not exist. Before the Court of Appeals the New York Commission requested that Court nullify Transco's certificates in Docket Nos. G-13183 and G-13590[32] as well as the certificates issued to the 26 producers. In its petition

[31] Circuit Judges Goodrich, Kalodner and Hastie, who made up the division which heard oral argument in the *Transco-Seaboard* case, were joined by Circuit Judge Staley in the order of September 9, 1959 denying the petitions for rehearing. Circuit Judges Kalodner, Staley and Hastie made up the division which heard oral argument in the *Catco* case.

[32] See page 14, *supra*.

for writ of certiorari the New York Commission dropped its attack on the Transco certificates, asking only "that the respondent's instant producer certifications be vacated. . . ."[33]

**1. Unlike CATCO Which Involved Simply the Sale of Gas From a Single Area to a Pipeline Company and Construction By the Pipeline Company of the Necessary Gas Purchase Lateral, the Proposed Sales by 26 Different Producer Applicants in TRANSCO-SEABOARD, From Fields Scattered Over 15,000 Square Miles, Represent a Small But Necessary Part of a Complex Interdependent Project Costing the Pipeline Company $147,000,000 and Bringing Over 350 Million Cubic Feet of Gas Per Day in the Winter to Millions of Consumers Living in Villages, Towns and Cities From Alabama to New York.**

In *Catco* the Commission was presented with the sale of gas from a single area located offshore Cameron Parish, Louisiana, with deliveries to be effected through a single gas purchase lateral.

In *Transco-Seaboard*, the Commission was concerned with the applications of 26 producers of natural gas[34] seeking authorization in 39 different dockets to sell to Transco gas reserves produced from 25 different fields scattered over an area exceeding 15,000 square miles in extent and to be gathered through more than 148 miles of gas purchase laterals costing an estimated $39,000,000. (See Appendixes B and D, hereto.) But this is not all. This gas supply was and is absolutely necessary to support certain proposals of Transco which were certificated by the Commission in the same order of September 4, 1958 (here under review) in

[33] Petition for Writ of Certiorari, page 27.

[34] The actual number of sellers is much larger than this number would indicate because several of the contracts have multiple sellers.

which the Commission authorized the producers to sell gas to Transco. As we noted in our statement of the case, the Commission authorized Transco to expand its transmission facilities at an estimated cost of $147,000,000. This involved construction of 970 miles of pipelines (including gas purchase laterals), installation of 14,500 horsepower of compression along the main transmission line and development of an old gas field in Pennsylvania (Leidy) into a storage pool. On the basis of the estimated two trillion cubic feet of additional gas supply obtained from the 26 producer applicants, Transco was authorized to use these new transmission facilities to undertake additional peak day sales to 30 customers of over 176 million cubic feet per day and a sale to one customer of ten billion cubic feet per year, and to provide 191 million cubic feet of storage service to ten customers. (See Appendix A, hereto.) These sales reflect the annual growth of the demands for natural gas of millions of consumers and thousands of industries in ten seaboard states.

Part of the gas supply here under attack has been flowing through the meters of consumers including those served by petitioners UGI and Philadelphia Electric and the utilities regulated by the New York Commission, since December 1958. Loss of this gas supply as a result of a reversal of the Commission's orders by this Court would not only jeopardize the additional service authorized by the September 4, 1958 order (constituting Transco's *1958* Program), but would disable Transco from continuing an additional 130 million cubic feet of daily sales to 44 customers initiated by Transco this year under its *1959* program.[35]

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[35] See Appendix C, hereto.

**2. Unlike CATCO, the Record Here Contains Substantial Evidence of the Existence of an Urgent Need for Increased Supplies of Natural Gas Within Ninety Days of the Commission's Order.**

In *Catco*, this Court failed to find any support whatsoever in the record for the conclusary finding on which the order was based that "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas." 360 U.S. at 393. Mr. Justice Harlan, joined by Mr. Justice Frankfurter, enlarged this criticism by observing that the Commission's finding as to market was defective "particularly insofar as this finding implies that this need is immediate and cannot be satisfied from Tennessee's existing reserves": *Id.* at 394. Mr. Justice Clark, after noting that this want of evidence arose from the fact that any need for the Catco reserves "was wrapped up in the Commission's action in Docket No. G-11107, where Tennessee was asking for permission to enlarge its facilities," stated (*Id.* at 393):

> "However, the two dockets were not consolidated and the Presiding Examiner conditioned his approval here on the granting of the application in Docket G-11107, *no part of which record is here. . . .*" (Emphasis added.)

Similar criticisms cannot properly be levied against the record in *Transco-Seaboard*. Here the 4 pipeline expansion applications[39] were considered and decided by the Commission in the same opinion and order which determined the 39 applications of the pro-

[39] Docket Nos. G-13143, G-13590, G-13745 and G-13793.

ducers.[37] Here it was found on the basis of voluminous evidence of record that the customers of Transco required additional gas service for the winter of 1958-59 which could not be provided without additional gas supplies. The Commission stated (R. 10, 348):

> "The record shows the urgent need for the supplies of gas this program would make available to meet Transco's resale gas system requirements commencing with the coming winter . . . . Without this gas, Transco will experience a peak day deficiency next winter [1958-1959] of 117,000 Mcf in meeting such requirements which will increase to 171,000 Mcf by 1961. . . ."

In his oral argument before the Supreme Court in *Catco*, Counsel for the New York Commission stated:

> "It is conceivable that there might be such a screaming need for gas under some circumstances, not here present, that they could junk price and not pay attention to it and not be guided principally by it."

We submit that the record here meets even this colorful standard.

**3. Unlike CATCO, the Record Here Shows That TRANSCO-SEABOARD Did Not Establish a New Price Plateau in Southern Louisiana.**

This Court made several observations in *Catco* as to the effect of the producer prices involved in that proceeding (360 U.S. at 390):

> "[T]he initial price will set a pattern in an area where enormous reserves of gas appear to be

[37] Docket Nos. G-13169, *et al.* Certificates were issued in 38 dockets. The application in Docket No. G-13591 was withdrawn by the applicant prior to the Examiner's decision (R. 9758).

> present. . . . The price certificated will in effect become the floor for future contracts in the area. . . ."

By contrast, the Commission found in *Transco-Seaboard* (R. 10,347):[38]

> "[T]he producer prices proposed do not set a new price level, since other pipelines are buying gas in the general area in the same price range."

Although Counsel for the New York Commission on oral argument questioned the correctness of these findings, the Court of Appeals stated:[39]

> ". . . There can be little doubt that the Transco contract prices actually represent the market price for natural gas in the area."

This Court's action in remanding the *Catco* case does not affect the validity of the above-quoted finding of the Commission in *Transco-Seaboard*. The producer price plateau established in south Louisiana prior to the time the Commission issued its September 4, 1958 order is maintained to this day by producer sales which have been authorized under certificate orders of the Commission which are no longer subject to court review. (See R. 2629, 2631, 6913-6926, 10,428; *cf.* 2683, 2684.)

The producer sales authorized by the Commission in *Transco-Seaboard* are made at several prices, each price made up of two elements: a base price and a tax reimbursement amount. Considered solely from the

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[38] The Presiding Examiner had previously made a similar finding. (R. 9771)

[39] 269 F. 2d at 868, footnote 9.

point of view of base price, these sales are at 21c, 21.4c, 21.5c and 22c. (R. 2677, 6927) But the full price to be paid depends on the tax currently collected by the State of Louisiana from producers, the size of the royalty due the United States from offshore production, and the nature of the contractual obligation to reimburse the producer for such taxes and royalties.

At the time hearings were held in *Transco-Seaboard* before the Presiding Examiner in the spring of 1958 and at the time he issued his Initial Decision, Louisiana required producers to pay a gathering tax of 1c and a severance tax of 3 mills. Apparently by adding this tax (or a portion of it) to the base price, the Presiding Examiner concluded that the level of prices in these gas purchase contracts ranged from 22.4c to 23.3c. (R. 9766) However, beginning in August 1958, the Louisiana tax obligation was changed by statute to a gathering tax of 2c and a severance tax of 3 mills. This was the tax actually in effect at the time the Commission issued its order herein on September 4, 1958. When the constitutionality of this new tax was questioned, Louisiana amended its tax laws, effective December 1, 1958, to provide for a severance tax of 2.3c per Mcf and no gathering tax. This is the current Louisiana tax situation.

On April 18, 1958, almost five months before the *Transco-Seaboard* order, the Commission issued its order in Re *Southern Natural Gas Company*, Docket Nos. G-13082, *et al.*, authorizing, *inter alia*, eleven producer applicants to undertake sales to Southern Natural Gas Company, an interstate pipeline company, from several fields onshore and offshore southern Louisiana at a base price of 21.5c plus tax reimburse-

ment.[40] Commissioner Compole, dissenting, argued (19 FPC 561):

> "This is another instance in which sales to Southern Natural from reserves located partly on-shore and partly off-shore in Louisiana are certificated at prices at an all-time high level for sales of natural gas from the reserves in the southwest. . . ."

These sales to Southern Natural were among the producer contracts referred to by Transco's Vice President in charge of Gas Supply when he testified (R. 2631-2632): "[W]e were obliged to negotiate for the new gas reserves against the background established by these higher prices."

Southern Natural is contractually obliged in certain instances to reimburse the producers a larger portion of the Louisiana tax than is Transco. For example, in terms of today's Louisiana tax, Southern Natural reimburses producers selling from Bayou Pigeon Field, Iberia Parish, under the April 18, 1958 order, 2.175¢ out of the total severance tax of 2.3¢. In other words, Southern Natural is paying producers under sales authorized by final orders of the Commission which are no longer subject to court review, a total of 23.675¢ (21.5¢ base price plus 2.175¢ for tax reimbursement). This price exceeds the highest price (23.55¢) currently being paid by Transco to producers under sales authorized by the Commission's order of September 4, 1958 here under review.[41]

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[40] 19 FPC 558. The April 18, 1958 order refers to a total producer price of 22.8 cents. This is made up of a base price of 21.5 cents plus tax reimbursement. As the cited official report of the Commission contains only an incomplete copy of the order of April 18, 1958, the order is reproduced in full in Appendix E, hereto.

[41] The following tabulation shows the prices actually being paid by Transco on November 1, 1959 to producers under sales author-

**4. Unlike CATCO, the Commission's Order Here Is Not Premised on Any Fear That the Producers' Gas Reserves Would Not Otherwise be Sold in Interstate Commerce.**

This Court made a special point of the lack of evidence supporting the Commission's finding in *Catco* that the producers would seek to dispose of their gas elsewhere than to Tennessee Gas Transmission Company and the interstate market if they were not authorized to charge the initial price provided for in their contracts. 360 U.S. at 394.

The Commission had no occasion to make any such finding in *Transco-Seaboard*. Unlike the situation in *Catco*, the Commission here found (R. 10, 365):

> "As to claimed producer threats, there are no such threats in this case. Various producers have reserved the right to terminate their contracts of sale with Transco if the seller does not obtain a satisfactory certificate. We do not consider such

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ized by the September 4, 1958 order and in accordance with rate schedules filed by the producers with the Commission:*

| Location of Reserves | Base Price | Tax or Royalty in Lieu of Tax** | Total Price Paid |
|---|---|---|---|
| Vermilion Parish | 21.0¢ | 2.05¢ | 23.05¢ |
| Offshore Vermilion Parish | 21.4¢ | 0¢*** | 21.4¢ |
| Jefferson Davis, St. James, St. Charles, Lafourche and Terrebonne Parishes | 21.5¢ | 2.05¢ | 23.55¢ |
| Offshore Cameron Parish | 22.0¢ | .2625¢*** | 22.2625¢ |

* Transco had not purchased gas from seven of the new fields as of November 1, 1959. However, the Company is purchasing gas under contracts representative of each of the above base price categories and it has not contracted to pay any higher prices than those shown in this tabulation for gas from the remaining fields.

** Reflects the Louisiana severance tax of 2.3¢ per Mcf effective December 1, 1958.

*** This is the tax or royalty in lieu of tax actually being paid. Should this Court ultimately extend the boundary of Louisiana so far out to sea that these reserves fall within the State's tax jurisdiction, then the tax obligation of Transco may be larger. See United States v. State of Louisiana, October Term, 1959, Orig. 10, now pending before this Court.

> reservations to be any limitation upon our right of inquiry into proposed rates set forth in the several producer contracts . . . . Where the possibility of non-acceptance of a certificate exists, we think the proper course is the same followed in every certificate case—to consider the competing factors, evaluate the alternatives, and decide as the public convenience and necessity requires."

In *Transco-Seaboard*, the Commission was not handed the *Cateo* alternative: sale to the pipeline company or no sale in interstate commerce. Instead, the Commission had to determine whether with the recommended price conditions the sale would be made to Transco by the producers or not.[42] (R. 10,348)

Transco is only one of several interstate pipeline companies purchasing gas in Louisiana. Transco attempted to contract for additional supplies of natural gas at 17¢ (the higher of the two price conditions recommended by petitioners) and failed. (R. 2629-2630) The reasons are obvious from the record. Other interstate pipeline companies have been actually purchasing gas from producers in southern Louisiana since 1953 at prices higher than 17¢. *Several interstate pipeline companies.* (other than Tennessee Gas Transmission Company) *had been purchasing gas in south Louisiana prior to the execution of the* Cateo *contracts in August 1956 at prices of at least 20¢ plus tax.* (R. 6914, 6916, 6919, 6921, 6922, 6926) Faced with these facts, it can hardly be said that the Commission abused its discre-

[42] In *Cateo*, this Court stated (360 U.S. at 387): "Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. Nor is there doubt that the producers were at liberty to refuse conditional certificates proposed by the Commission's second order . . . ."

tion when it refused to gamble on losing Transco's gas reserves to some other interstate pipeline company, which had for several years been paying higher prices for gas under certificates no longer subject to court review, on the eve of the 1958-1959 winter heating season by attaching the requested price conditions to the producer certificates.

**5. Unlike CATCO Where the Cost Impact Was Obscure, Transco's Customers Were Advised, in Advance That an Increase in Cost of Gas to Them Was the Necessary Concomitance of Additional Gas Service.**

This Court found insufficient evidence in *Catco* to support a finding of public convenience and necessity where no effort had been made to show why the pipeline purchaser, Tennessee Gas Transmission Company, had to pay more for the *Catco* reserves than its weighted average cost of gas. The Court did not find convincing the evidence as to whether the certification of the price would trigger the favored-nations clauses in other contracts of Tennessee Gas. It also noted that the purchase of gas by Tennessee Gas from the *Catco* producers led to an increase in rates by Tennessee Gas to its customers. (360 U.S. at 393)

Turning to *Transco-Seaboard*, the record evidence shows that Transco advised its customers that it could not acquire the gas reserves needed to supply their increased requirements unless it raised the price which it was offering the producers for new gas reserves. (R. 2633) The larger customers, in turn, agreed to pay Transco more for all of the gas they purchased from Transco, if necessary, in order to obtain the additional gas service involved in this case. (R. 6785-6870) There has been no attempt in *Transco-Seaboard* to

conceal the fact that the acquisition of the new gas reserves would result in a rate increase to Transco's customers. Transco admitted that some of its old contracts with producers in southern Louisiana would be triggered, although there is no certainty as to the amount of increase that will result from such triggering as the producers seeking rate increases by virtue of triggering must meet the rate standards of Section 4 of the Natural Gas Act before such increase can become permanent.[43] (R. 2655-2656) In this connection, it should be remembered that favored-nations clauses are in Transco's old contracts; contracts which are on file with the Commission as rate schedules and which Transco cannot change. However, Transco was able in its new contracts, which are the subject of this proceeding, to eliminate all favored-nations and price redetermination clauses. (R. 2632)

II

**THE COMMISSION'S RECENT CERTIFICATE ORDERS DEMONSTRATE THAT IT IS UNNECESSARY FOR THIS COURT TO REPEAT ITS STATEMENT IN CATCO AS TO THE COMMISSION'S DUTIES.**

The *Catco* case is clearly distinguishable from this case, as we have just shown. But even if this were not so, Petitioners have cited no good reason why the Supreme Court should again consider the Commis-

[43] Had Transco acquired the reserves required for the *1958* expansion program in Railroad Districts 2 and 4 in Texas, instead of in south Louisiana, the triggering of favored-nations clauses in existing Texas contracts would have resulted in an increase in cost of gas of approximately $15,000,000 per annum. (R. 606) By contrast, the estimated maximum impact of triggering existing Louisiana contracts is approximately $5,000,000 per annum, assuming the producers can ultimately justify the increases in Section 4 rate proceedings. (R. 2656)

sion's duties and functions under Section 7 of the Natural Gas Act so soon after the *Cateo* decision.

*Cateo* was decided by the Supreme Court on June 22, 1959. The Federal Power Commission has shown by its actions since that time that it is constantly aware of that decision and understands its implications. Evaluating all factors bearing on the public interest, the Commission thereafter declined to attach price conditions to certificates of public convenience and necessity issued to certain independent producers where the Commission was not convinced that a new producer price plateau would be established in an area, or where the Commission has concluded from the evidence that the circumstances justified allowing the higher initial price.[44]

Where the Commission has concluded from an evaluation of the record that the establishment of a new producer price plateau is not required by the public convenience and necessity, it has not hesitated to attach price conditions to the certificates issued to the independent producer applicants which would require that the sales be initiated at lower price levels. By order issued August 10, 1959, the Commission attached lower price conditions to the bulk of the gas supply upon which an entirely new pipeline from

[44] Re Trunkline Gas Co., Docket Nos. G-15394, *et al.*, rehearing denied July 22, 1959; Re South Georgia Natural Gas Company, *et al.*, Docket Nos. G-9892, *et al.*, FPC Opinion No. 325 issued August 7, 1959; Re Texas Gas Transmission Corporation, *et al.*, Docket Nos. G-17335, *et al.*, FPC Opinion No. 327 issued August 10, 1959; Re The California Company, Docket Nos. G-16108, *et al.*, August 10, 1959; Re Sun Oil Company, Docket Nos. G-15122, *et al.*, August 10, 1959; Sunray Mid-Continent Oil Company, Docket No. G-14753, August 10, 1959; Re Superior Oil Company, Docket Nos. G-16380, *et al.*, August 10, 1959.

Texas to California was based.[45] Again, on October 13, 1959, the Commission refused to allow Phillips Petroleum Company to initiate a new sale to United Gas Pipe Line Company unless it reduced its initial price because the proposed higher price established a new price plateau and had not been shown to be required by the public convenience and necessity.[46]

This is the only pre-*Catco* Commission certificate case now in the courts. Clearly applying the standards of the *Catco* decision of this Court, the Court below affirmed the Commission of the basis of the record in this case. It is obvious from its actions since the *Catco* decision, that the Commission *too has been* following that decision.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that these petitions for writ of certiorari should be denied.

Respectfully submitted,

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[45] FPC Opinion No. 328, issued August 10, 1959, Re Transwestern Pipeline Company, Docket Nos. G-14871, *et al.*

[46] FPC Opinion No. 330, issued October 13, 1959, Re Phillips Petroleum Company, Docket Nos. G-15514, *et al.*

# APPENDIX A

ADDITIONAL SERVICE AUTHORIZED BY FEDERAL POWER COMMISSION ORDER ISSUED SEPTEMBER 4, 1958 (20 FPC 264)[1]

(Transco's *1958* Expansion Program)

| Map Code[2] | Customer | Additional Allocation Mcf day at 14.7 psia | Rate Schedule |
|---|---|---|---|
| 1 | Brooklyn Borough Gas Company | 1,000 | CD-3 |
| 2 | Brooklyn Union Gas Company, The | 30,000 | CD-3 |
| 3 | Elizabethtown Consolidated Gas Company | 3,000 | CD-3 |
| 4 | Long Island Lighting Company | 25,000 | CD-3 |
| 5 | Philadelphia Electric Company | 10,000 | CD-3 |
| 6 | Public Service Electric and Gas Company | 50,000 | CD-3 |
| 7 | South Jersey Gas Company | 3,000 | CD-3 |
| 8 | United Gas Improvement Company, The | 12,500 | CD-3 |
| 9 | Danville, Virginia, City of | 3,000 | CD-2 |
| 10 | Laurens, South Carolina, City of | 3,460 | CD-2 |
| 11 | Public Service Company of North Carolina, Inc. | 3,000 | CD-2 |
| 12 | Atlanta Gas Light Company | 22,010 | CD-1 |
| 13 | Linden, Alabama, City of | 1,525 | CD-1 |
| 14 | Manufacturers Light and Heat Company, The | 1,190 | G-3 |
| 15 | Pittston Gas Company | 1,426 | G-3 |
| 16 | Central Virginia Gas Company | 1,985 | G-2 |
| 17 | Clinton Newberry Natural Gas Authority | 490 | G-2 |
| 18 | North Carolina Gas Corporation | 500 | G-2 |
| 19 | Union, South Carolina, City of | 162 | G-2 |
| 20 | Butler, Alabama, City of | 50 | G-1 |
| 21 | Commerce, Georgia, City of | 103 | G-1 |
| 22 | Covington, Georgia, City of | 236 | G-1 |
| 23 | Elberton, Georgia, City of | 460 | G-1 |
| 24 | Jefferson, Georgia, City of | 137 | G-1 |
| 25 | Lawrenceville, Georgia, City of | 313 | G-1 |
| 26 | Monroe, Georgia, City of | 500 | G-1 |
| 27 | Sugar Hill, Georgia, City of | 53 | G-1 |
| 28 | United Cities Gas Company | 265 | G-1 |
| 29 | Winder, Georgia, City of | 150 | G-1 |
| 30 | Owens-Corning Fiberglas Corporation | 1,000 | Direct Sale |
| | Total Additional Peak Day Sales Allocations | 176,515 | |

[1] All of this authorized additional service has commenced except for deliveries to New York State Natural Gas Corporation under Rate Schedule ACQ-3 which will begin January 1, 1960, as originally proposed.

[2] This is the code used to identify on Appendix B (in green) the locations of customers authorized to receive the additional service.

Appendix A (Continued)

STORAGE SERVICE

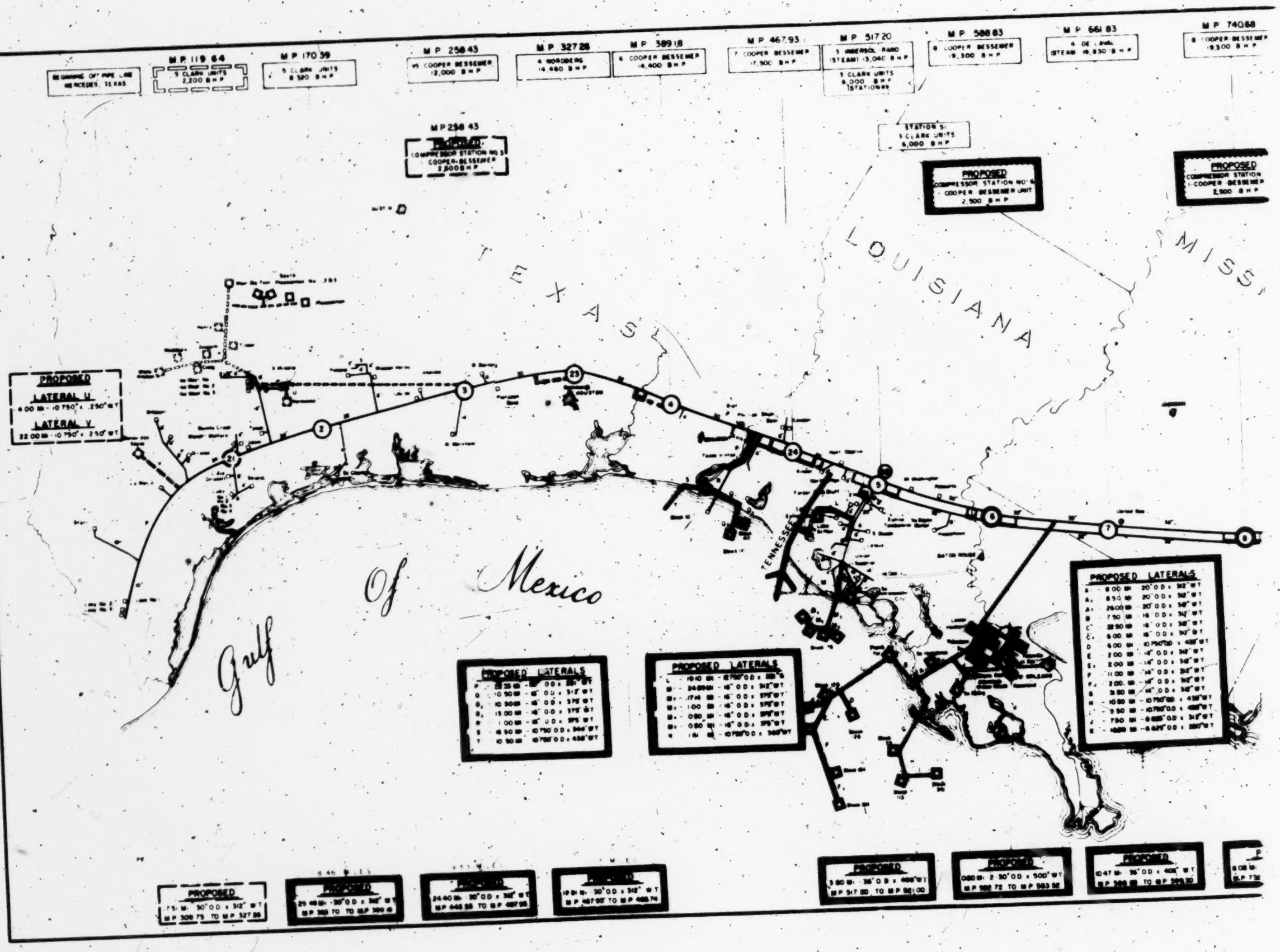
| Map Code[2] | Customer | Additional Allocation Mcf/day at 14.7 psia | Rate Schedule |
|---|---|---|---|
| 1 | Brooklyn Borough Gas Company | 1,000 | LS |
| 2 | Brooklyn Union Gas Company, The | 40,000 | LS |
| 31 | Consolidated Edison Company of New York, Inc. | 30,000 | LS |
| 32 | Delaware Power and Light Company | 2,000 | LS |
| 3 | Elizabethtown Consolidated Gas Company | 6,000 | LS |
| 4 | Long Island Lighting Company | 25,000 | LS |
| 5 | Philadelphia Electric Company | 20,000 | LS |
| 6 | Public Service Electric and Gas Company | 60,000 | LS |
| 7 | South Jersey Gas Company | 2,000 | LS |
| 8 | United Gas Improvement Company, The | 5,000 | LS |
| | Total Leidy Storage Service Allocations | 191,000 | |

ANNUAL FIRM SALE

| | | | |
|---|---|---|---|
| 33 | New York State Natural Gas Corporation | 10,000,000[3] | ACQ-3 |

[2] This is the code used to identify on Appendix B (in green) the locations of customers authorized to receive the additional service.

[3] Annual quantity.


M P 119 64
3 CLARK UNITS
2,200 B H P
M P 170 39
3 CLARK UNITS
6,320 B H P
M P 258 43
4 COOPER BESSEMER
12,000 B H P
M P 327 28
4 WORTHINGTON
14,480 B H P
M P 389 18
6 COOPER BESSEMER
16,400 B H P
M P 467 93
7 COOPER BESSEMER
17,500 B H P
M P 517 20
3 INGERSOL RAND
(STEAM) 13,040 B H P
3 CLARK UNITS
6,000 B H P
(STATION 4)
M P 588 83
5 COOPER BESSEMER
9,300 B H P
M P 661 83
4 DE LAVAL
(STEAM) 19,850 B H P
M P 740 68
5 COOPER BESSEMER
9,300 B H P
M P 258 43
PROPOSED
COMPRESSOR STATION NO 3
COOPER-BESSEMER
2,500 B H P
STATION 5:
3 CLARK UNITS
6,000 B H P
PROPOSED
COMPRESSOR STATION NO 6
1 COOPER BESSEMER UNIT
2,500 B H P
PROPOSED
COMPRESSOR STATION
1 COOPER BESSEMER
2,500 B H P
PROPOSED
LATERAL U
LATERAL V
TEXAS
LOUISIANA
MISS
Gulf Of Mexico
PROPOSED LATERALS
PROPOSED LATERALS
PROPOSED LATERALS
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PROPOSED

M P 740.68
8 COOPER BESSEMER
9,300 B H P

M P 811.37
7 COOPER BESSEMER
16,800 B H P

M P 890.74
4 CLARK UNITS
(STEAM) 20,300 B H P

M P 969.63
7 COOPER BESSEMER
16,800 B H P

M P 1048.48
7 COOPER BESSEMER
16,800 B H P

M P 1124.88
9 CLARK UNITS
14,720 B H P

M P 1206.07
6 COOPER BESSEMER
14,400 B H P

M P 1287.35
8 CLARK UNITS
12,960 B H P

M P 1369.68
7 CLARK UNITS
11,200 B H P

M P 1457.23
COOPER BESSEMER
2,000 B H P

M P 811.37
PROPOSED
COMPRESSOR STATION NO 9
1-COOPER-BESSEMER
2,500 B H P

PROPOSED
COMPRESSOR STATION NO 8
1-COOPER-BESSEMER UNIT
2,500 B H P

PROPOSED
COMPRESSOR STATION NO 9
1-COOPER-BESSEMER UNIT
2,500 B H P

M P 969.63
PROPOSED
COMPRESSOR STATION NO 11
1-COOPER-BESSEMER
2,500 B H P

PROPOSED
COMPRESSOR STATION NO 11
1-COOPER-BESSEMER UNIT
2,500 B H P

M P 1048.48
PROPOSED
COMPRESSOR STATION NO 12
1-COOPER BESSEMER
2,500 B H P

M P 1124.88
PROPOSED
COMPRESSOR STATION NO 13
1-CLARK
2,000 B H P

M P 1206.07
PROPOSED
COMPRESSOR STATION NO 14
1-COOPER BESSEMER
2,300 B H P

M P 1247.28
1 CLARK
12,500 B H P

M P 1326.41
PROPOSED
COMPRESSOR STATION NO 15
2 WORTHINGTON
7,640 B H P

M P 1413.21
5 CLARK UNITS
10,000 B H P

M P 1499.5x
PROPOSED
COMPRESSOR STATION
2 COOPER BESSEMER
8,800 B H P

TENNESSEE

MISSISSIPPI

ALABAMA

GEORGIA

FLA.

SOUTH CAROLINA

NORTH CAROLINA

VIRGINIA

8 9 10 11 12 13 14 15 16 17 18 19 20 21 22

PROPOSED LATERALS

PROPOSED

PROPOSED

PROPOSED

PROPOSED

PROPOSED

PROPOSED

PROPOSED

PROPOSED

PROPOSED

M P 1457 23
5 COOPER BESSEMER
12,000 B H P

M P 1540 59
7 CLARK UNITS
11,200 B H P

M P 1628 95
7 - CLARK UNITS
11,200 B H P

M P 1722.36
8 - CLARK UNITS
15,600 B H P

M P 1831 57
END OF PIPE LINE
MANHATTAN

M P 1413 21
5 CLARK UNITS
10,000 B H P

M P 1499 51
PROPOSED
COMPRESSOR STATION NO 37
2 COOPER BESSEMER UNITS
8,800 B H P

M P 1583 56
5 INGERSOLL - RAND UNITS
10,000 B H P

M P 1674 75
PROPOSED
COMPRESSOR STATION NO 38
2-WORTHING UNITS
7640 B H P

PENNSYLVANIA

PROPOSED
14.49 MI - 23.375" O.D. x .375" W.T.
DELAWARE RIVER TO LEIDY

N E W

PROPOSED
.980 MI - 30" O.D. x .500" W.T.
CENTERVILLE, NJ TO DELAWARE R.

PROPOSED
.6 90 MI - 36" O.D. x .500" W.T.
M.P. 1778.78 TO CENTERVILLE, NJ

PROPOSED
29.72 MI - 36" O.D. x .469" W.T.
M.P. 1748.04 TO M.P. 1778.76

PROPOSED
6.90 MI - 36" O.D. x .500" W.T.
M.P. 1820.60 TO M.P. 1827.5

JERSEY

SCALE

—LEGEND—

- REGULATOR STATION
- TRANSCONTINENTAL EXISTING FACILITIES
- TRANSCONTINENTAL PURCHASE METER STATION
- TRANSCONTINENTAL SALES METER STATION
- TRANSCONTINENTAL EXCHANGE METER STATION
- CUSTOMER OWNED EXCHANGE METER STATION
- FACILITIES PROPOSED DOCKET 6-13980 1958 CONSTRUCTION
- FACILITIES CERTIFICATED OR UNDER CONSTRUCTION
- PROPOSED FACILITIES OTHER DOCKETS
- FACILITIES PENDING APPROVAL DOCKET 6-13980
- PROPOSED FACILITIES DOCKET 6-13143
- FACILITIES PROPOSED DOCKET 6-13980 1959 CONSTRUCTION
- FACILITIES PROPOSED DOCKET 6-13746

Atlantic Ocean

MD. DEL.

G I N I A

N O R T H

I N A

PROPOSED
16.66 MI - 36" O.D. x .406" W.T.
M.P. 1378.66 TO M.P. 1395.32

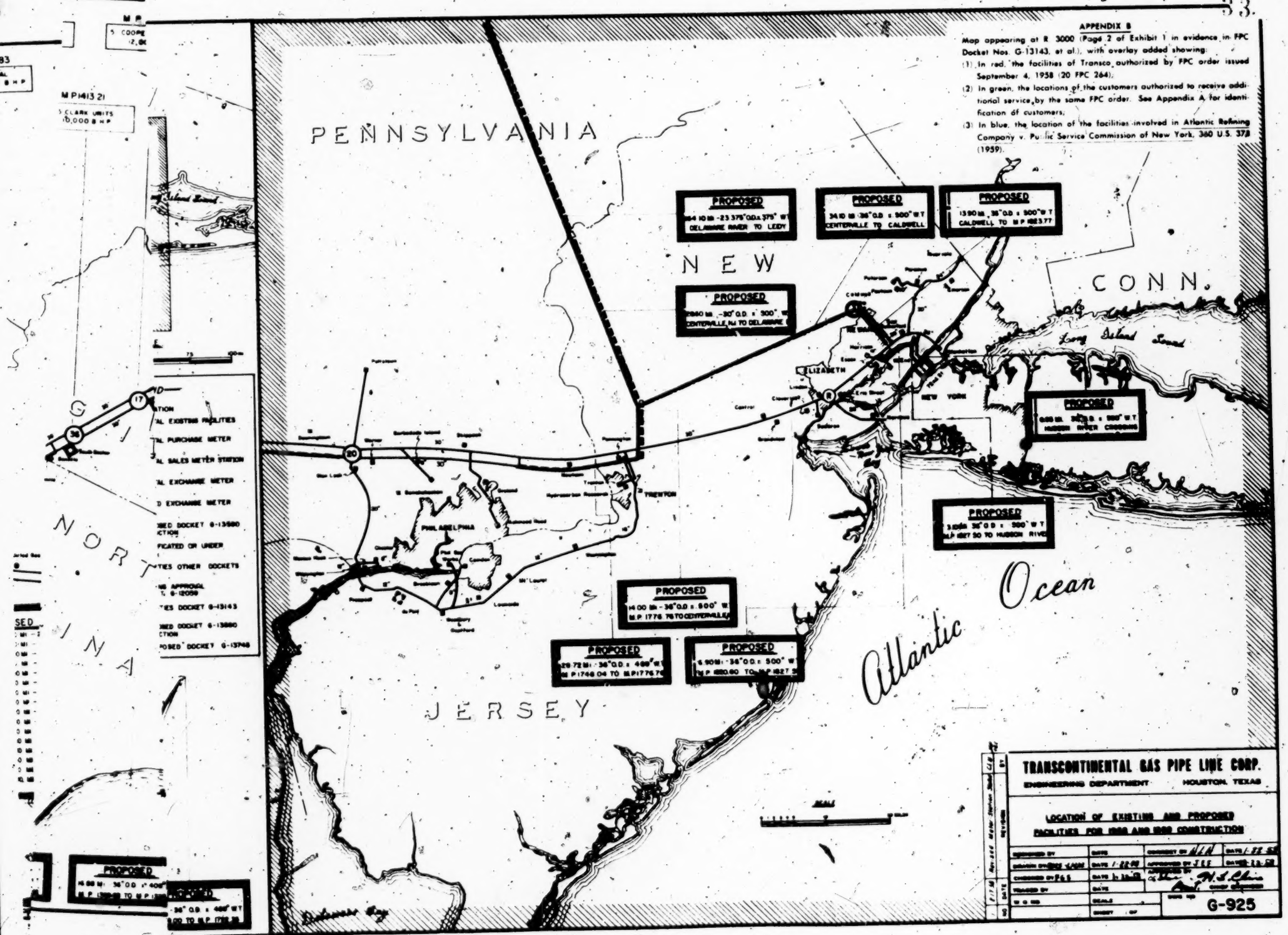
PROPOSED
11.63 MI - 30" O.D. x .312" W.T.
M.P. 1395.32 TO M.P. 1406.95

PROPOSED
15.93 MI - 36" O.D. x .406" W.T.
M.P. 1406.95 TO M.P. 1422.88

PROPOSED
17.38 MI - 36" O.D. x .406" W.T.
M.P. 1422.88 TO M.P. 1440.26

PROPOSED
8.23 MI - 30" O.D. x .312" W.T.
M.P. 1720.77 TO M.P. 1729.00

PROPOSED
13.36 MI - 36" O.D. x .406" W.T.
M.P. 1729.00 TO M.P. 1742.36


APPENDIX B
Map appearing at R. 3000 (Page 2 of Exhibit 1 in evidence in FPC Docket Nos. G-13143, et al.), with overlay added showing:
(1) In red, the facilities of Transco authorized by FPC order issued September 4, 1958 (20 FPC 264);
(2) In green, the locations of the customers authorized to receive additional service by the same FPC order. See Appendix A for identification of customers;
(3) In blue, the location of the facilities involved in Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378 (1959).
PENNSYLVANIA
NEW JERSEY
CONN.
Long Island Sound
Atlantic Ocean
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PROPOSED
PHILADELPHIA
TRENTON
ELIZABETH
NEW YORK
TRANSCONTINENTAL GAS PIPE LINE CORP.
ENGINEERING DEPARTMENT HOUSTON, TEXAS
LOCATION OF EXISTING AND PROPOSED FACILITIES FOR 1958 AND 1959 CONSTRUCTION
G-925

# APPENDIX C

ADDITIONAL SERVICE PROPOSED BY TRANSCO IN FPC DOCKET NO. G-16603 AND AUTHORIZED BY FPC ORDER ISSUED NOVEMBER 17, 1959[1]

(Transco's *1959* Expansion Program)

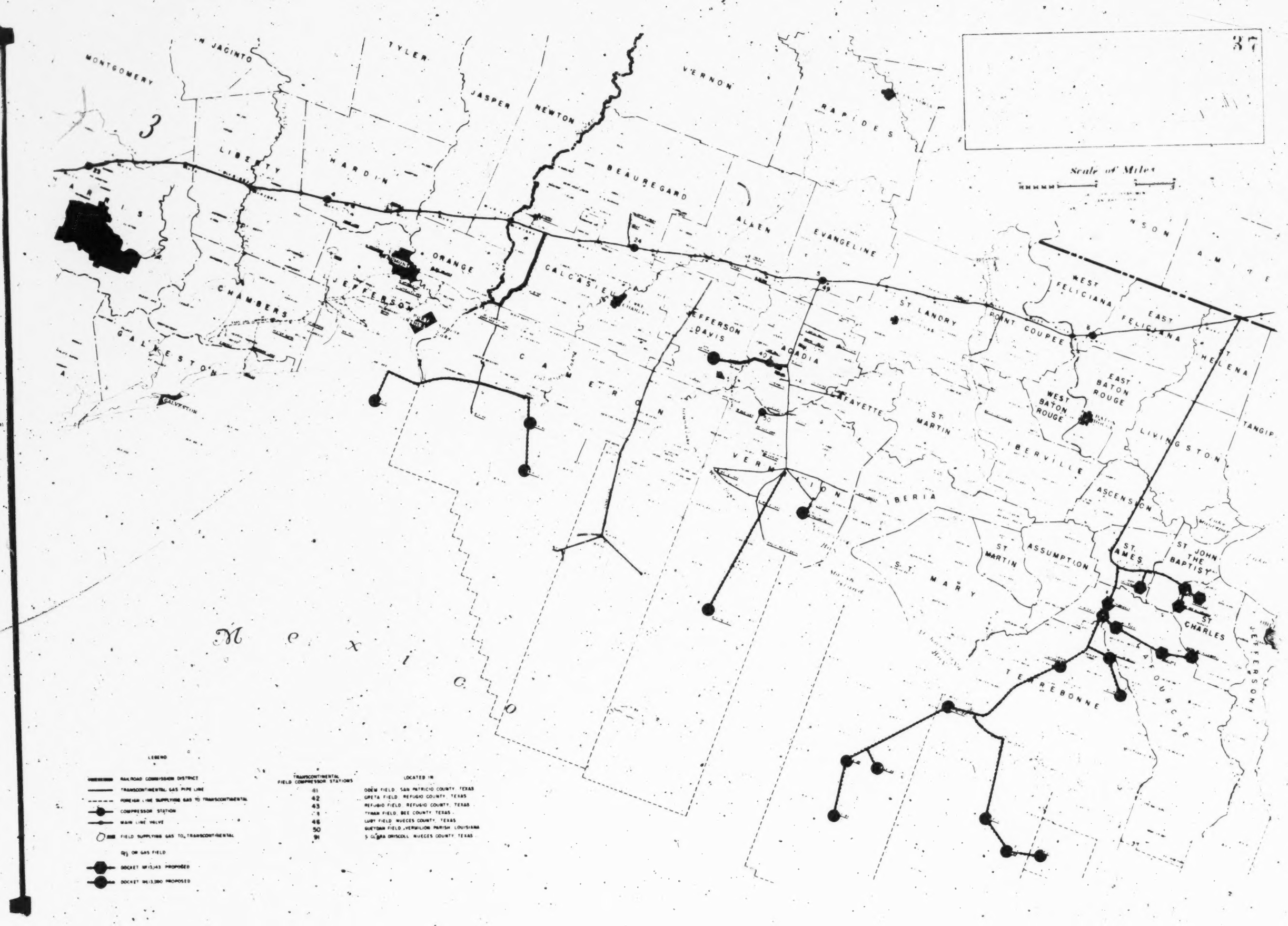
| Customer | Proposed Additional Allocation Mcf/day *at* 14.7 psia | Rate Schedule |
|---|---|---|
| Consolidated Edison Company, of New York, Inc. | 25,000 | CD-3 |
| Brooklyn Union Gas Company, The | 500 | CD-3 |
| Delaware Power and Light Company | 3,000 | CD-3 |
| Eastern Shore Natural Gas Company | 480 | CD-3 |
| Elizabethtown Consolidated Gas Company | 1,500 | CD-3 |
| Long Island Lighting Company | 10,000 | CD-3 |
| South Jersey Gas Company | 5,000 | CD-3 |
| United Gas Improvement Company, The | 5,000 | CD-3 |
| Atlantic Seaboard Corporation | 25,000 | CD-2 |
| Carolina Natural Gas Corporation | 300 | CD-2 |
| Danville, Virginia, City of | 2,000 | CD-2 |
| Laurens, South Carolina, City of | 500 | CD-2 |
| Piedmont Natural Gas Company, Inc. | 13,461 | CD-2 |
| Public Service Company of North Carolina, Inc. | 9,000 | CD-2 |
| Atlanta Gas Light Company | 2,000 | CD-1 |
| Frederick Gas Company, Inc. | 500 | G-3 |
| Blacksburg, South Carolina, Town of | 50 | G-2 |
| Fountain Inn, South Carolina, Town of | 221 | G-2 |
| Lexington, North Carolina, City of | 378 | G-2 |
| North Carolina Gas Service | 1,000 | G-2 |
| South Carolina Gas Company (Division of United Cities Gas Company) | 175 | G-2 |
| Southwestern Virginia Gas Company | 800 | G-2 |
| Alexander City, Alabama, City of | 810 | G-1 |
| Bowman, Georgia, City of | 54 | G-1 |
| Buford, Georgia, City of | 860 | G-1 |
| Butler, Alabama, Town of | 200 | G-1 |
| Clanton, Alabama, City of | 808 | G-1 |
| Commerce, Georgia, City of | 800 | G-1 |
| Covington, Georgia, City of | 1,500 | G-1 |
| East Central Alabama Gas District | 512 | G-1 |
| Elberton, Georgia, City of | 600 | G-1 |
| Georgia Gas Company (Division of United Cities Gas Company) | 235 | G-1 |
| Hartwell, Georgia, City of | 800 | G-1 |
| Jefferson, Georgia, City of | 600 | G-1 |
| Lawrenceville, Georgia, City of | 900 | G-1 |
| Maplesville, Alabama, Town of | 82 | G-1 |
| Mid-Georgia Gas Company | 932 | G-1 |
| Monroe, Georgia, City of | 900 | G-1 |

[1] Transco commenced 9,910 Mcf of this service last winter under temporary certificate issued January 9, 1959. On October 16, 1959 Transco received a temporary certificate authorizing the company to begin the remainder of the service. On November 1, 1959, Transco was providing the additional service to all but four customers, three of whom want the service to begin in December, 1959. Service to the last customer will begin as soon as a new chemical plant now under construction is completed this winter.

Appendix C—Continued

| Customer | Proposed Additional Allocation Mcf/day @ 14.7 psia | Rate Schedule |
|---|---|---|
| Roanoke, Alabama, City of | 600 | G-1 |
| Royston, Georgia, City of | 451 | G-1 |
| Sugar Hill, Georgia, Town of | 150 | G-1 |
| Toccoa, Georgia, City of | 790 | G-1 |
| Wedowee, Alabama, Town of | 249 | G-1 |
| Winder, Georgia, City of | 900 | G-1 |
| Total additional peak day sales allocations | 129,589 | |
| Sun Oil Company | 9,000 | X-111 |
| Total additional sales and transportation allocations | 138,589 | |

[1] A transportation service which does not depend upon the gas supplies dedicated by contract to Transco.




LEGEND

- RAILROAD COMMISSION DISTRICT
- TRANSCONTINENTAL GAS PIPE LINE
- FOREIGN LINE SUPPLYING GAS TO TRANSCONTINENTAL
- COMPRESSOR STATION
- MAIN LINE VALVE
- FIELD SUPPLYING GAS TO TRANSCONTINENTAL
- OIL OR GAS FIELD
- DOCKET 1813,143 PROPOSED
- DOCKET 1813,200 PROPOSED

| TRANSCONTINENTAL FIELD COMPRESSOR STATIONS | LOCATED IN |
|---|---|
| 41 | ODEM FIELD, SAN PATRICIO COUNTY, TEXAS |
| 42 | GRETA FIELD, REFUGIO COUNTY, TEXAS |
| 43 | REFUGIO FIELD, REFUGIO COUNTY, TEXAS |
| 1 | TYNAN FIELD, BEE COUNTY, TEXAS |
| 46 | LUBY FIELD, NUECES COUNTY, TEXAS |
| 50 | GUEYDAN FIELD, VERMILION PARISH, LOUISIANA |
| 91 | S. GLORIA DRISCOLL, NUECES COUNTY, TEXAS |

## APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

In the Matters of*

| | |
|---|---|
| Southern Natural Gas Company | Docket Nos. G-13082 & G-13379 |
| Aluminum Company of America | Docket No. G-13290 |
| Howell & Howell[1] | Docket No. G-13115 |
| Sohio Petroleum Company[2] | Docket No. G-13135 |
| Tidewater Oil Company | Docket No. G-13051 |
| Shell Oil Company[3] | Docket No. G-13256 |
| Continental Oil Company[3] | Docket No. G-13301 |
| John W. Mecom[4] | Docket No. G-13110 |
| The California Company | Docket No. G-13222 |
| Lyons & Logan[5] | Docket No. G-13487 |
| C. G. Glascock-Tidelands Oil Company, *et al.*[6] | Docket No. G-13781 |
| Berkshire Oil Company and R. R. Frankel | Docket No. G-13224 |

### Findings and Order Issuing Certificates of Public Convenience and Necessity

(Issued April 18, 1958)

Southern Natural Gas Company (Southern Natural), a Delaware corporation, with its principal place of business in Birmingham, Alabama, filed two applications on August 19 and October 7, 1957, in Dockets Nos. G-13082 and G-13379 respectively, pursuant to Section 7 of the Natural Gas Act, for authority to construct and operate certain facilities described therein.

* See appendix concerning footnotes.

The purpose of the proposed facilities above referred to is to enable Southern Natural to procure additional supplies of natural gas from the various other applicants named in the caption hereof by constructing extensions, laterals and loops on its South Louisiana supply system to increase the capacity of the supply system as it now exists. No increase in the sales capacity of Southern's system is proposed.

The facilities proposed in Docket No. G-13082 are as follows:

136.8 miles of 24 and 26-inch pipelines (Toca-Gwinville), the estimated cost of which is $15,666,690.

198.2 miles of 4½-inch to 20-inch supply lines, the estimated cost of which is $20,057,010.

3,650 horsepower compressor additions to its White Castle and Toca stations, the estimated cost of which is $1,160,800.

18 measuring stations, the estimated cost of which is $278,000.

The facilities proposed in Docket No. G-13379 are as follows:

7.19 miles of 20-inch line loops on the Gwinville-Pickens line, the cost of which is estimated at $598,310.

660 horsepower compressor addition at Franklinton station, the estimated cost of which is $211,100.

17.3 miles of 6⅝ and 16-inch supply lines, the estimated cost of which is $1,751,890.

5 measuring stations, the estimated cost of which is $44,000.

The proposed facilities together with those certificated in Docket No. G-13203 on March 17, 1958, will increase the capacity of Southern Natural's South Louisiana Supply

system by 298,030 Mcf per day and this increased volume will be used by existing customers within the existing market and to supplement the diminishing supplies from the Carthage and Monroe Fields. All of the facilities proposed will be operated as integral parts of the present system and the gas which is to flow through them will be commingled with gas from other sources of supply transported in interstate commerce and resold for ultimate public consumption as hereinbefore stated.

Southern Natural has not shown the plan of financing the costs of the proposed projects; but it has demonstrated its ability to induce capital investments in past construction projects. The volumes of the gas reserves to be acquired, including certain small quantities not presently dedicated by contracts but represented as being within the reach of probability, are estimated at approximately 1,042,553 MMcf.

On September 18, 1957, Aluminum Company of America, a Pennsylvania corporation, with its principal place of business at Pittsburgh, Pennsylvania, filed an application in Docket No. G-13290 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from certain lands and leaseholds located in the South Section 28 Field, St. Martin Parish, Louisiana, owned and operated by applicant and described fully in its application.

On August 22, 1957, Howell, Holloway & Howell, a partnership, composed of G. B. Howell, W. C. Holloway and Vernon C. Howell, of Dallas, Texas, filed an application (supplemented January 31, 1958) in Docket No. G-13113 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from properties in the North Bayou Boullion and East-Happytown Fields, St. Martin and Iberville Parishes,

Louisiana, respectively, all as more fully described in the application. On December 21, 1957, W. C. Holloway, one of the partners, sold and assigned his interests in the partnership to the two remaining members and on January 31, 1958, a supplement or amendment to the application just mentioned was filed requesting a change of name of the applicant to Howell & Howell.

On August 26, 1957, Sohio Petroleum Company, an Ohio corporation with its principal place of business in Cleveland, Ohio, filed an application in Docket No. G-13135 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from certain lands and interests in Bayou Boullion Field, Iberville and St. Martin Parishes, Louisiana, as fully described in the application.

On August 12, 1957, Tidewater Oil Company, a Delaware corporation with its principal place of business at San Francisco, California, filed an application in Docket No. G-13051 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from certain lands and interests in Bayou Boullion Field, St. Martin and Iberville Parishes, Louisiana, as fully described in the application.

On September 11, 1957, Shell Oil Company, a Delaware corporation, with its principal place of business in New York, New York, filed an application in Docket No. G-13256 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from a lease in the Loisel Field, Iberia and St. Mary Parishes, Louisiana, as more fully described in the application.

On September 20, 1957, Continental Oil Company, a Delaware corporation, with its principal place of business in

Houston, Texas filed an application in Docket No. G-13301 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from Loisel Field, St. Mary and Iberia Parishes, Louisiana, as more fully described in the application.

On August 21, 1957, John W. Mecom, Operator, for himself and Freeport Oil Company, of Houston, Texas, filed an application in Docket No. G-13110 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from land and leases in the Lake Washington Field Area, Plaquemines Parish, Louisiana, as more fully described in the application.

On September 5, 1957, the California Company, a California corporation with its principal place of business at New Orleans, Louisiana filed an application in Docket No. G-13222 for a certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce to Southern Natural for resale from volumes produced from applicant's leases located in various fields and parishes in the state of Louisiana, as more fully described in the application.

On October 16, 1957, Lyons & Logan, a co-partnership, formed by C. H. Lyons, Sr., C. H. Lyons, Jr., Hall M. Lyons, G. L. Logan, E. L. Hilliard, G. F. Abendroth and J. T. Pahner, as Operator, and on behalf of others named, all of Shreveport, Louisiana, filed an application in Docket No. G-13487 for a certificate of public convenience and necessity authorizing it to sell natural gas in interstate commerce to Southern Natural for resale from volumes produced from certain lands in the Bayou Long and Mystic Bayou Fields, Iberia and St. Martin Parishes, Louisiana, as more fully described in the application.

On November 21, 1957, C. G. Glasscock-Tidelands Oil Company, a Delaware corporation, with its principal place

of business at Corpus Christi, Texas, (Operator) filed an application in Docket No. G-13781 for a certificate of public convenience and necessity authorizing it to sell natural gas in interstate commerce to Southern Natural for resale from volumes produced from certain lands owned and operated by it in connection with others, located in the East Bayou Pigeon Field, Iberia Parish, Louisiana and more fully described in the application.

On September 5, 1957, Berkshire Oil Company, a Texas Corporation, and R. R. Frankel, of Houston, Texas, filed a joint application in Docket No. G-13224 for a certificate of public convenience and necessity authorizing them to sell natural gas in interstate commerce to Southern Natural for resale from volumes produced from lands leased or controlled by them in the Bayou Pigeon Field, Iberia Parish, Louisiana, as more fully described in the application.

The additional supplies of gas to Southern Natural will be made available by reason of the proposed construction and operations of the proposed facilities and such supply is reasonably adequate to justify the proposed construction.

The applications of the independent producers and the contracts between Southern and such independent producers submitted with the applications indicate that the initial prices proposed to be paid by Southern thereunder will be 22.8¢ per Mcf. These proposed prices will be among the highest to be paid for natural gas produced in the Southern Louisiana area. In view of this fact we will by subsequent order institute investigations pursuant to Section 5 (a) of the Natural Gas Act as to the reasonableness of the prices proposed to be paid to the following applicants: Aluminum Company of America; Howell & Howell; Sohio Petroleum Company; Shell Oil Company; Continental Oil Company; John W. Mecom; Lyons & Logan;

C. G. Glasscock-Tidelands Oil Company, *et al.* and Berkshire Oil Company and R. R. Frankel.[1]

Pursuant to due notice, a public hearing was commenced in Washington, D. C., on April 7, and concluded, after a recess on April 10, 1958, respecting the matters involved in and the issues presented by the applications.

A petition for leave to intervene was filed by Gas Gathering Corporation on April 1, 1958 and thereafter on April 4, 1958 Notice of Withdrawal of the petition was filed. On April 3, 1958, a protest to the granting of the applications in the proceedings was filed by the Mayor and City Attorneys of Tuscaloosa, Alabama, and on April 4, 1958, a petition for leave to intervene was filed by the same parties. On April 7, 1958 notice of withdrawal of the protest and petition for leave to intervene was filed by Tuscaloosa's Mayor and City Attorneys. Southern Natural filed an answer to the petition of Tuscaloosa on April 7, 1958; but no person appeared to represent either of the interveners. Accordingly, there being no protestants or interveners at the hearing, staff counsel moved at the hearing that the intermediate decision procedure be omitted and the Commission render a decision pursuant to Section 1.30 (c) (1) of the Commission Rules of Practice and Procedure.

*The Commission finds:*

(1) Applicant, Southern Natural Gas Company, a Delaware corporation with its principal place of business at Birmingham, Alabama, is a "natural gas company" within the meaning of the Natural Gas Act, as heretofore found by the Commission.

(2) The facilities hereinbefore described are proposed to be used in the transportation and sale of natural gas in interstate commerce for resale, subject to the jurisdic-

[1] Investigations pursuant to Section 5 (a) of the Natural Gas Act have been initiated in connection with Tidewater Oil Company and The California Company.

tion of the Commission, as integral parts of Southern Natural's existing pipeline system and the construction and operation thereof by Southern Natural are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) All of the applicants above named, except Southern Natural, upon commencement of the sales proposed herein, will be engaged in sales of natural gas in interstate commerce for resale, for ultimate public consumption, subject to the jurisdiction of this Commission, and therefore each of them will be a "natural gas company" within the meaning of the Natural Gas Act.

(4) The sales of natural gas hereinbefore described, and as more fully described in the Applications on file herein by said Applicants, excepting Southern Natural, will be made in interstate commerce, subject to the jurisdiction of this Commission, and such sales by them together with the operation of any facilities, subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(5) All Applicants hereinabove named are able and willing properly to do the acts and perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission hereunder.

(6) The proposed construction and operation of the facilities by Southern Natural, and the proposed sales of natural gas by the other Applicants named herein together with the operation of any facilities subject to the jurisdiction of the Commission necessary therefor are required by the public convenience and necessity, and certificates therefor should be issued as hereinafter ordered and conditioned.

(7) Public convenience and necessity requires that: (a) the general terms and conditions set forth in paragraphs

(a), (b), (c) (3), (c) (4) and (e) of Section 157.20 of the Commission Regulations Under the Natural Gas Act (18 CFR 157.20) should attach to the certificates issued to Southern Natural and to the exercise of the rights granted thereunder; (b) the time within which construction of the facilities authorized by this order shall be completed and in actual operation should be fixed at nine months from the date of issuance of this order; (c) an adequate plan of financing of the proposed construction which is satisfactory to the Commission shall be filed before the construction commences.

(8) Staff counsel at the close of the hearing made the request for the omission of the intermediate decision procedure as provided by Section 1.30 (c) of the Commission's Rules of Practice and Procedure. There being no opposition to the said request by any party of record, and, not having been denied by the Commission, is granted, pursuant to Section 1.30 (c) (1) of the said Rules.

*The Commission orders:*

(A) Certificates of public convenience and necessity be and the same hereby are issued to Southern Natural Gas Company to construct and operate the facilities hereinbefore described, and as more fully described in the applications in Docket Nos. G-13082 and G-13379 in this proceeding for the transportation and sale of natural gas as therein set forth, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(B) Certificates of public convenience and necessity be and are hereby issued to all other applicants listed herein, excepting Southern Natural, upon the terms and conditions of this order, authorizing the sales by them of natural gas in interstate commerce for resale, together with the operation of any facilities, subject to the jurisdiction of the Commission, upon the terms and conditions of this order.

(C) The certificates issued to Southern Natural shall be accepted in writing, and under oath, by a responsible official of Southern Natural and the general terms and conditions set forth in paragraphs (a), (b), (c) (3), (c) (4) and (e) of Section 157.20 of the Commission's Rules of Practice and Procedure shall attach to the issuance of the certificates granted under paragraph (A) hereof, and to the exercise of the rights granted thereunder.

(D) Southern Natural shall submit to the Commission for its approval a satisfactory plan of financing of the costs of construction proposed prior to its undertaking of construction of any of the facilities authorized hereby.

(E) The certificates issued to Applicants herein, excepting Southern Natural, shall be deemed accepted and of full force and effect, unless refused in writing and under oath by them within 30 days from the issuance of this order.

(F) The time within which the facilities hereby authorized to Southern Natural shall be constructed and placed in actual operation, as provided by paragraph (b) of Section 157.20 of the Commission's Rules of Practice and Procedure is hereby fixed at nine months from the date on which this order issues.

(G) The certificates issued to all the Applicants named herein are not transferable and shall be effective only so long as they continue the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission thereunder.

(H) The requests for withdrawal of the petitions to intervene and the protest filed by Gas Gathering Corporation and the Mayor and City Attorneys of Tuscaloosa, Alabama, are granted and the petitions and protests are stricken from the files.

(I) The grant of the certificates to the Applicants listed herein, excepting Southern Natural, shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against them. Further, our action in this proceeding shall not foreclose or prejudice any future proceedings or objections relating to the operation of any price or related provision in the gas purchase contracts herein involved.

By the Commission. Chairman Kuykendall and Commissioner Stueck concur in the result for the reasons stated in their separate statements issued with Opinion No. 309, *In the Matters of Seaboard Oil Company, Operator, et al.* Docket Nos. G-11970, *et al.*

Commissioner Connole dissenting.

JOSEPH H. GUTRIDE
Joseph H. Gutride,
*Secretary.*

## APPENDIX

[1] W. L. Pickens, Trustee, 25 percent interest; Howell & Howell, formerly Howell, Holloway & Howell (Operator) 46.91186 percent interest; Magna Oil Corporation, 28.00814 percent interest.

[2] Sohio Petroleum Company (Operator) 48.63 percent interest; Rycade Oil Corporation, 6.95 percent interest; Howell & Howell, formerly Howell, Holloway & Howell, 44.42% interest.

[3] Shell Oil Company (Operator) 80% interest; Continental Oil Company, 20% interest.

[4] John W. Mecom (Operator), 50% interest; Freeport Oil Company, 50% interest.

[5] Lyons & Logan, a co-partnership, consisting of C. H. Lyons, Sr., C. H. Lyons, Jr., Hall M. Lyons, G. L. Logan, E. L. Hilliard, G. F. Abendroth and J. P. Palmer (Operators), W. H. Cocke, Sr., and W. H. Cocke, Jr., (non operators).

[6] C. G. Glasscock-Tidelands Oil Company, Petroleum, Inc., Don C. Wiley and Buel Humphreys, Jr.

DIGBY, Commissioner, *concurring:*

I concur in the order granting a certificate of public convenience and necessity to sell natural gas. I object to any reference in the order concerning the issuance of a certificate of public convenience and necessity for the facilities of the independent producer or gatherer of gas.

A certificate of public convenience and necessity is neither required nor properly issued for construction and operation of facilities of a producer or gatherer. The action of a majority of this Commission issuing a certificate for facilities is improper for it represents an assertion of power denied to us by Congress.

We have recognized the absence of power over facilities when, in Order No. 174 and Order No. 174-A, we failed to provide any procedure whereby application could be made for a certificate authorizing their construction and operation. We did promulgate procedural rules to enable filing of applications for certificates authorizing a sale or transportation. There was not even a suggestion that at

some later time we would authorize or require authorization for construction and operation of facilities.

The action heretofore taken, insofar as it made no provision with respect to facilities, was wholly consistent with the declarations of the Supreme Court in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U. S. 498, 505; *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U. S. 581, 598; *Interstate Natural Gas Company* v. *Federal Power Commission*, 331 U.S. 682, 690-691, and *Phillips Petroleum Company* v. *State of Wisconsin*, 74 Sup. Ct. 794, 797-798. The language of the Court in these cases is clear and unambiguous. In *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, *supra*, the Court stated that the "natural and clear meaning" of production or gathering contained in Section 1(b) of the Act encompassed "the producing properties and gathering facilities of a natural-gas company." In *Colorado Interstate Gas Co.* v. *Federal Power Commission*, *supra*, the Court stated that the production or gathering exemption applies to the "physical activities, facilities and properties used in the production and gathering of natural gas." In *Interstate Natural Gas Company* v. *Federal Power Commission*, *supra*, the Court stated that effect must be given to the exemption of producing and gathering, and indicated clearly that facilities, properties and activities of a producer and gatherer were exempted. The Court, in *Phillips Petroleum Company* v. *State of Wisconsin*, *supra*, held only that a sale in interstate commerce for resale was not within the exemption of Section 1(b). The discussion with respect to facilities and the recitation of the above-cited cases represents clear recognition of the intended scope and effect of the exemption as regards facilities.

The issue to be resolved is whether the Natural Gas Act requires that a certificate of public convenience and necessity issue for construction and operation of the fa-

cilities necessary to effect a sale by a producer or gatherer in interstate commerce for resale. The issue is not whether a sale of gas in interstate commerce for resale can be made without facilities. It cannot be doubted that facilities necessary to effect a sale of natural gas in interstate commerce are facilities used in interstate commerce. Recognition of this fact cannot, however, create power in this Commission to issue, much less to require, certificates authorizing construction and operation of such facilities.

CONNOLE, Commissioner, *dissenting:*

This is another instance in which sales to Southern Natural from reserves located partly on-shore and partly off-shore in Louisiana are certificated at prices at an all-time high level for sales of natural gas from the reserves in the southwest. The record contains no testimony or evidence supporting why the public convenience and necessity requires the sale at this price. For reasons I have set forth before in other proceedings, including the strikingly similar order in *Re Southern Natural Gas Company, et al.*, G-11234, et al., issued July 12, 1957, and in the recent order in *Re Seaboard Oil Company, Operator, et al.*, G-11970, et al., issued March 31, 1958, I am unable to associate myself with the majority order.

Incidentally, my participation in the order granting certificates in part of the applications involved in this sale (*Re Southern Natural Gas Company, et al.*, in G-13203, et al., issued March 17, 1958) was the result of error and oversight on my part. I specifically disavow my participation therein by this separate statement.

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WILLIAM R. CONNOLE,

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# In the Supreme Court of the United States

OCTOBER TERM, 1959

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No. 459

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETITIONER

*v.*

FEDERAL POWER COMMISSION, ET AL.

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No. 473

THE UNITED GAS IMPROVEMENT COMPANY AND PHILADELPHIA ELECTRIC COMPANY, PETITIONERS

*v.*

FEDERAL POWER COMMISSION, ET AL.

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

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**BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION**

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**OPINION BELOW**

The opinion of the Court of Appeals (P.[1] Pet. App. A–1—A–8) is reported at 269 F. 2d 865. The

[1] "P. Pet. App." refers to the appendix to the petition in No. 459. The opinion is also reproduced in the appendix to the petition in No. 473 (U. Pet. App. 18–25). For simplicity, references to the opinion below will be only to the opinion as reproduced in the appendix in No. 459.

opinions of the Federal Power Commission (R. 481–556, 602–610) are reported at 20 F.P.C. 264 and 571.

## JURISDICTION

The judgments of the Court of Appeals were entered on August 4, 1959 (P. Pet. App. A–9; U. Pet. App. 26). Petitions for rehearing, timely filed, were denied on September 9, 1959 (P. Pet. App. A–10; U. Pet. App. 27). The petition in No. 459 was filed on October 9, 1959; in No. 473 on October 14, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

## QUESTION PRESENTED

Whether in light of *Atlantic Refining Co.* v. *New York Public Service Commission,* 360 U.S. 378 (*Catco*), the Court of Appeals erred in failing to hold that, in the circumstances here presented, the Federal Power Commission abused its discretion by issuing to the producer applicants certificates of public convenience and necessity under Section 7(e) of the Natural Gas Act for the sale of natural gas for resale in interstate commerce without rate conditions.

## STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act are set forth in the appendix to No. 459 at pp. B1–B4 and in the appendix to No. 473 at pp. 28–34.

## STATEMENT

This proceeding concerns the validity of an order of the Federal Power Commission authorizing sales of

natural gas by independent gas producers to Transcontinental Gas Pipe Line Corporation (Transco) for transmission and resale in interstate commerce.

By applications filed with the Commission, Transco sought authority under Section 7(e) of the Natural Gas Act to expand its transmission facilities at an estimated cost of about $150,000,000 (R. 428–430). This expansion program was undertaken by Transco in order to provide an additional 173,634 Mcf of gas per day needed by its distributing company customers on the Eastern Seaboard to meet the increased demand of new and existing consumers on their systems (P. Pet. App. A–4).

To provide the gas supply for this expansion program, Transco entered into some 38 contracts with 26 producers (P. Pet. App. A–2; R. 483 484). These producers agreed to sell gas to Transco from reserves estimated to contain 2 trillion cubic feet of gas located in different fields scattered through southern Louisiana and the Gulf of Mexico (P. Pet. App. A–5). The contracts, which were for terms of at least 20 years, provided initial prices ranging from 21 to 22 cents per Mcf, exclusive of tax reimbursement (R. 302–303), and 2 cent escalations every four years. The contracts contained no favored nation or price redetermination clauses (P. Pet. App. A–5).

The 38 producer certificate applications were consolidated for hearing before a Commission Examiner in which a number of Transco's customers and other interested parties, including petitioners, intervened

(R. 412–413).[2] The principal issue raised at these hearings was the compatibility with the public convenience and necessity of the proposed producer prices. Petitioners, as well as the Commission's staff, contended that the proposed prices had not been sufficiently supported and that the Commission should issue the certificates only on the condition that the initial price be reduced to either 17 cents or 9.79 cents per Mcf (R. 491).

The Examiner found that although the statutory "reasonableness" of the proposed rates had not been established, "there is no evidence of any kind from which a finding could be made that the ultimate consumers of the gas here involved will be materially adversely affected by reason of the [proposed] price * * *" (R. 419–420). He concluded that the public convenience and necessity required the issuance of certificates without any price condition (R. 423).

Agreeing with the Examiner, the Commission first noted its understanding that (R. 488):

> * * * public convenience and necessity is a "complex" encompassing numerous elements which in diversity and importance vary with the circumstances of particular cases; and in determining whether a certificate should issue, we must weigh the relative importance of the several factors involved, as well as balance the favorable against the unfavorable, if any. * * * [I]t may well be that * * * an aspect of a pro-

[2] The same Examiner conducted separate hearings on Transco's related application (R. 483). The producer and pipeline applications were then consolidated for argument before the Commission, which rendered a single opinion and order (R. 483).

> posal not wholly desirable standing alone should be accepted where offsetting favorable features exist which would in sum total yield a greater public good * * *.

Turning to the price issue, the Commission commented that while price is an "element in determining public convenience and necessity in a producer certificate case," it is only one factor, the importance of which may be materially lessened in relation to other factors in circumstances such as those found to exist in this case (R. 488). In addition, the Commission agreed with the Examiner's finding that there was no evidence in the record to show that the "producer prices proposed are unreasonable" and with his further finding that the proposed prices did not set a new price level "since other pipelines are buying gas in the general area in the same price range." (R. 489). Finally, the Commission noted that there was no evidence showing that the proposed prices will have any material adverse effect upon the ultimate consumers although some price increase to Transco's customers as a result of these producer prices could be anticipated.[3]

Against this potential price increase the Commission balanced the public need for the gas disclosed in the record and concluded in its opinion issued September 4, 1958, that the certificate should be issue without price conditions (R. 490):

[3] The contract prices for these new gas supplies will in themselves increase Transco's average cost of gas in 1960 only 6 mills per Mcf over its 1958 average cost of gas and only 3 mills over what it would be at the 17¢ price for the gas proposed by petitioners.

> * * * The record shows the urgent need for the supplies of gas this program would make available to meet Transco's resale gas system requirements commencing with the coming winter. * * * Without this gas, Transco will experience a peak day deficiency next winter [1958–1959] of 117,000 Mcf in meeting such requirements which will increase to 171,000 Mcf by 1961. Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere. In our judgment, a consideration of all the factors giving to each its appropriate weight can lead only to the conclusion that public convenience and necessity requires the certification of the producer sales at the initial prices proposed * * *.[4]

Petitioners sought review in the court below which affirmed, one judge dissenting. Expressly testing the Commission's order against this Court's decision in *Catco,* the court stressed that the evidence in the record here demonstrated that there was an urgent public need for gas on the Transco system (P. Pet. App. A–4) and that the producer prices do not establish "a new price plateau in the southern Louisiana shopping area" (P. Pet. App. A–5). Noting further that *Catco* left with the Commission the responsibility for evaluating all the factors bearing on the public interest under Section 7(e) of the Natural Gas Act, the court of appeals concluded

[4] In reaching this conclusion, the Commission specifically did not base it "on any technical consideration of who has the burden of proof or of going forward with the evidence" (R. 492).

that, since all the necessary elements had been weighed in the balance by the Commission, there was no basis for setting the Commission's order aside (P. Pet. App. A–6—A–7).

## ARGUMENT

In seeking to have this Court again review the propriety of the Federal Power Commission's issuance to producers of certificates of public convenience and necessity for jurisdictional sales of natural gas without rate conditions, petitioners claim primarily that, in affirming the Commission's grant of certificates here involved, the court below failed properly to apply this Court's decision in the *Catco* case. Petitioners' various contentions in this respect are, however, predicated on a misconception of the *Catco* decision which, properly read, does not preclude the result below. Indeed, inasmuch as the Commission's certificate grants here involved were issued prior to this Court's decision in *Catco,* the court below, the same court which reversed the Commission's grants in *Catco,* took special care, before affirming the present certificate grants, to make certain not only that these authorizations were not barred by *Catco* but also that remand in light of *Catco* was unnecessary.[5]

[5] That the question of remand to the Commission in light of *Catco* was considered by the court below is evidenced by the dissent based on that ground (P. Pet. App. A–7). It is significant, however, that at the same time Judge Hastie, in his dissent, also commented that he was "not now prepared to challenge" the majority's conclusion that "the result reached by the Federal Power Commission in these cases is a permissible result despite the strictures" of the *Catco* decision (P. Pet. App. A–7).

In addition to the result below being in full accord with *Catco,* the present case involves the only Commission order which became final prior to this Court's decision in *Catco* and still is the subject of litigation. Moreover, while it has granted certificates for several new jurisdictional sales of gas to producers since this Court's *Catco* decision, the Commission, in determining whether to accept the prices as proposed or reject them in favor of price conditions, has sought scrupulously to adhere to the teachings of *Catco.* In light of the recency of this Court's *Catco* decision, there is as yet only limited experience against which to test the Commission's balancing of conflicting considerations which comprise the public interest, and hence review of the basic question sought to be raised would seem inappropriate at this time.[6]

1. (a) *Catco* rejected the argument that the Natural Gas Act imposed an obligation upon the Commission to ascertain that the proposed prices for new producers' sales of gas are "just and reasonable" within the meaning of the rate sections of the Act from the outset and held instead that price is but one factor, albeit an important one, of the many which the Commission must balance in determining whether certificates for such producer sales satisfy the standard of the public convenience and necessity and thus may be

[6] Petitioners in No. 473 (at pp. 13–14) seek in addition a ruling by this Court on the scope of the Commission's power to impose rate conditions. No such question is involved in the present posture of this case inasmuch as the form of rate condition, if one is to be imposed, is initially a matter for the Commission and here the Commission has granted the certificates without any price conditions.

authorized under Section 7(e) (360 U.S. at 390–391). Although the Court went on to admonish that there must be "a most careful scrutiny and responsible reaction to initial price proposals of producers" (360 U.S. at 391), this responsibility, the Court indicated, could be discharged by guarding against a price which is "out of line or [whose] approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise" (360 U.S. at 391). Such prices are not to be sanctioned in the absence of evidence demonstrating either the producers' need for such prices or an urgent need by the consuming public for the gas. Since in *Catco*, the Commission had held that the 21.4 cent per Mcf price was clearly out of line and there was no evidence either showing reasons justifying the higher price or an urgent public need for the gas, the Court concluded (360 U.S. at 392):

> * * * [T]here was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates.

(b) The affirmance by the court of appeals of the Commission certificate grants here involved is clearly proper under *Catco*. Unlike the situation presented in *Catco*, the record here contains more than ample evidence demonstrating that the proposed producer prices are in line with the market price in southern Louisiana at the time the Commission issued the present certificate grants. Although these prices are similar to that involved in *Cacto* in the sense that they are at a comparative level (see Pet. in No. 459, p. 12),

about 15 months had elapsed between the Commission's last *Catco* order (June, 1957) and its order in the instant case (September, 1958) and during this period the Commission had authorized other sales in the southern Louisiana area at the same price level. See, *e.g., Southern Natural Gas Co., et al.*, 19 F.P.C. 558, and P. Pet. App. A–6.[7] Since the Commission's orders with regard to those other sales were then final and no longer subject to judicial review, the prices for those sales, quite apart from the *Catco* price, established the new plateau in the southern Louisiana area. As a result, the prices here, while comparable to that in *Catco,* are in line with prevailing prices in that area and hence, unlike the *Catco* price, do not set a new price plateau in the southern Louisiana area.

Moreover, there will not be any unwarranted triggering of general price rises. While under some of Transco's contracts with its producers, the producer will be contractually entitled to a price increase under the contract's "favored nation" clause, these price increases without exception would be subject to the Commission's Section 4(e) suspension and refund powers.[8] Consequently, any amount of the increase

[7] Petitioner in No. 459 at page 16 admits that in addition to the sales contracts cited by the court below there were numerous "other sales not specifically mentioned" at the same price level.

[8] Petitioner in No. 459 states (fn., p. 9), without any citations, that the Commission has permitted some increased rates filed by producers as a result of the triggering of favored nation clauses by the Transco sales to become effective without suspension or any showing as to their justness and reasonableness. As far as we have been able to ascertain from an examination of the Commission's files, petitioner's statement can refer

found unreasonable by the Commission would be subject to refund. In contrast, it is significant that the producer contracts here involved do not contain any favored nation or price redetermination clauses whereby other purchases of gas by Transco would trigger the prices agreed to under these contracts.

In addition, although the proposed producer prices will increase Transco's average cost of purchased gas, the amount of this increase does not reach the proportions suggested by petitioners (Pet. in No. 459, p. 6,

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only to the three increased rates involved in *Hassie Hunt Trust, et al.*, Docket Nos. G-17431, *et al.*, which involved annual rate increases aggregating about $420,000 out of the $5,000,000 total. In those proceedings, increased rate proposals, stemming from triggering by favored nation clauses, initially tendered for filing on November 28, 1958, were rejected and returned by letter from the Secretary of the Commission on December 5, 1958, on the ground that the proposed rates were inappropriate because they included partial reimbursement of the two cent per Mcf Louisiana gas gathering tax which had been suspended by Louisiana. On December 8, 1958, the rejected filings were again submitted to the Commission, accompanied by letters urging that the Secretary's action had been erroneous. The increased rate proposals were accepted for filing on December 10, 1958, and were suspended, by order issued January 9, 1959, until May 28, 1959.

After petitions for court review of the January 9 order had been filed, the Commission, on May 6, 1959 (21 F.P.C. 639), vacated the suspension order because of its view that the rate filings had automatically become effective 30 days after the initial filing on November 28, 1958, and hence the Commission's suspension order was too late to be valid. Thereafter the court review proceeding was dismissed. A petition for review of the May 6, 1959, order is pending in *United Gas Improvement Co.* v. *Federal Power Commission*, C.A. 5, No. 17, 952. The Secretary's administrative error in initially rejecting the filings lends no support to the suggestion in the petition in No. 459 that the Commission will intentionally permit favored nation rate increases to go into effect without suspension or hearing.

fn., and p. 13; Pet. in No. 473, p. 6). Based on Transco's projected deficiency figures for 1960 and its 1958 volumes and costs, the average increase in the cost of purchased gas sustained by Transco as a result of purchasing the instant supply at the contract prices will amount to only approximately 3 mills per Mcf more than would have resulted from the 17-cent-per-Mcf rate proposed by petitioners. (See also *supra*, p. 5, fn. 3).[9]

In any case, this increase in average cost of gas is more than counterbalanced by the need of Transco's customers for this supply of gas. On this matter the evidence in the record here, again unlike the record in *Catco*, is overwhelming and, indeed, is not controverted by petitioners. In fact, the estimated increase of demand from existing customers would produce peak day deficiencies in supply of 116,800 Mcf in 1959, 159,400 Mcf in 1960 and 171,200 Mcf in 1961 (P. Pet. App. A–4). These deficiencies would be

[9] Petitioner in No. 459 seeks to leave the impression that the actual increase in average costs of gas to Transco will be about 3.97 cents per Mcf (Pet. in No. 459, p. 6 and fn.). But even the 2-cent increase contemplated by the so-called *Memphis* letters (see Pet. in No. 473, p. 5, fn.) was not wholly attributable to increased gas costs, but included as well the costs of Transco's proposed project, the capital costs of which alone amount to about $150,000,000. In addition, the 3.97 cent figure represents the entire rate increase filed by Transco in May, 1959 in FPC Docket No. G–18783. This increase, however, is attributable to increases in other costs as well as the increase in the average cost of gas resulting from the certificates issued here. Moreover, about $5,000,000 of the increase was based on triggered increases of other contracts which the Commission may never allow. In this connection it is noteworthy that, on an annual basis, the Commission has allowed only about 60% of the increases in rates filed by the pipelines.

eliminated by the producer sales to Transco involved in this proceeding (P. Pet. App. A-4). Since these reserves had been laboriously assembled through 38 separate contracts with 26 producers in the southern Louisiana area, which is Transco's main buying area (R. 115–116), alternative sources of supply probably could not be assembled to replace the present producer contracts in time to wipe out the anticipated peak day deficiencies. "Without these supplies, most likely these customers would at best find it necessary to purchase gas at higher prices elsewhere" (R. 490).[10]

Since the evidence summarized above amply supports the Commission's findings, the court below was fully justified in holding that the Commission had weighed all the necessary elements in the balance as set out in *Catco* and hence that there was no basis under *Catco* for setting the Commission's orders aside.

2. While not seriously disputing that the proposed producer prices are not out of line with those prevail-

[10] The consumer need for gas is highlighted by the statement during the Commission hearings of counsel for Brooklyn Union Gas Company, one of Transco's largest customers (Tr. 2041):

> Because of its urgent need for additional gas, and the improvement which Brooklyn Union understands these proposed producer sales will make in Transcontinental's reserves, Brooklyn Union urges that these proceedings be expedited to the fullest possible extent. Unless Brooklyn Union can obtain additional natural gas to meet the increasing demands of its customers, it believes that any ultimate adverse effect on its rates to consumers will be greater than may eventually result from the prices to be paid these producers for the gas involved in these proceedings.

See also R. 611–613.

ing in southern Louisiana,[11] petitioners nevertheless claim that allowance of these prices is prohibited by *Catco*. These arguments are, however, without merit.

(a) According to petitioners, since the producer prices here involved are comparable to that in *Catco*, this Court's rejection of the *Catco* price, of itself requires the rejection of the prices here (Pet. in No. 459, pp. 12–14). In the same vein, it is urged that acceptance of the producer prices here would, in effect, nullify the remand in *Catco* (Pet. in No. 459, pp. 23–24; Pet. in No. 473, pp. 12–13).

These arguments misconceive the thrust of *Catco*. The *Catco* price was struck down not because that price was held to be *per se* bad and hence prohibited under any and all circumstances, but rather because on the record before the Commission and the courts, the evidence was insufficient to support its allowance—an insufficiency which had led the Commission in its first two *Catco* orders to impose rate conditions upon the certificates. See *supra*, pp. 8–9. Since the Court's remand in *Catco* was predicated solely on the deficiencies of the record, the allowance of the com-

[11] Petitioners in No. 473 do not question the Commission's finding that the proposed prices are not out of line with the prevailing market prices in the southern Louisiana area. Similarly, the New York Commission does not raise any such question as to the prices in all but 4 of the 38 producers contracts here involved. See Pet. in No. 459, pp. 7, 14, fn. Even under these 4 contracts the prices, including tax reimbursement, being paid by Transco are still below the 23.675 cent price, including tax reimbursement, in the producers sales certificated in *Southern Natural Gas Co., et al.*, 19 F.P.C. 558. See Supplemental Brief for Transco in court below in this case at p. 7 and fn. 1.

parable prices here, based as it is on a different and far more adequate record, is not precluded by *Catco*. By the same token, such a result does not nullify the remand in that case.

(b) It is also argued that the prices now prevailing in southern Louisiana cannot be accepted as the current market price because they were propagated as a result of the price allowed by the Commission in *Catco* and hence constitute its illegitimate progeny (Pet. in No. 459, p. 16). Basically, this comes down to a claim that inasmuch as this Court remanded the Commission's orders allowing the price proposed in *Catco*, the prices in the southern Louisiana area must henceforth be rolled back to pre-*Catco* levels.

Apart from the legal and practical problems which would be thus generated (cf. *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371, 374), this argument again is predicated on a misconception of the *Catco* decision. As already pointed out, *supra*, pp. 14–15, the Court in *Catco* did not preclude the Commission from approving the prices there proposed on a proper evidentiary showing, but merely held that the evidence then in the record was insufficient. Since the *Catco* price was thus not of itself fatally defective, there is no reason for not giving full scope and effect to the subsequent sales authorized by the Commission at comparable prices.

Moreover, regardless of how the price in the southern Louisiana marketing area reached its present plateau, it cannot be ignored that with the passage of time following the Commission's decision in *Catco*, the price in the southern Louisiana area has gone up

to the new plateau. Inasmuch as the thrust of *Catco* is to "hold the line" (360 U.S. at 392) and guard against unwarranted leaping of prices "from one plateau to the higher levels of another" (360 U.S. at 391) rather than to roll back presently established prices, *Catco* offers no obstacle to acceptance of the current prices being paid in southern Louisiana as the prevailing market prices.

(c) Finally, it is urged that the prevailing prices cannot be accepted because they have not yet been found reasonable by the Commission (Pet. in No. 473, p. 10). But, in *Catco*, the Court made it clear that "the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5" (360 U.S. at 390). Recognizing that Commission regulation of the producers was still in a "formative period" and "the ground rules * * * are [still] being evolved" (360 U.S. at 391), the Court ruled that, at least during this period, the Act's purpose of consumer protection would be amply satisfied by keeping prices from increasing without warrant above those prevailing in the market at the time. "Section 7 procedures in such situations thus act to hold the line," so that the consuming public may be protected until a just and reasonable rate is determined under other sections of the Act (360 U.S. at 392).

3. Equally without substance are petitioners' attacks on the Commission's findings that there was an urgent public need for this gas.

(a) It is claimed that need for the gas was by Transco, not its customers, and that the asserted

need constitutes "nothing more than [Transco's] ability to market successfully more gas than it then had available to sell" (Pet. in No. 459, p. 21). This claim distorts the true situation. Generally, the desire for gas since World War II has emanated from the consuming public, which despite almost explosive expansion in pipeline facilities since 1946 to meet these demands, still shows no signs of saturation. See Brief for the Federal Power Commission in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, Nos. 23, 25, and 26, Oct. Term, 1958, at pp. 64–71. That it is this kind of demand, *i.e.*, demand by the consuming public for more gas, which is present in this case is evidenced not only by the testimony of Transco's customers (See P. Pet. App. A–4—A–5) but also by the so-called Memphis letters in which all of Transco's customers agreed to a 2-cent rate increase, subject to their right to oppose on grounds of reasonableness, in order to enable Transco to seek certification of its expansion program (see Pet. in No. 473, p. 5, fn., p. 7, fn.). It is also manifest from the fact that only two of Transco's 27 customers protested the producer prices in the proceedings below. See also *supra*, pp. 12–13 and fn. 10. Even these two customers admittedly intervened in the proceedings on the Transco expansion program in order to make sure that they were allocated a share of the increased volumes of gas proposed to be made available (see Pet. in No. 473, p. 4), and both have been careful to make it clear that their opposition is confined to the producer

prices and does not embrace the expansion program of Transco for which this very gas is a *sine qua non*.

(b) Also it is argued that the need for additional gas cannot justify the allowance of the prices here proposed (Pet. in No. 473, p. 9). This contention flies in the face of the *Catco* decision, which plainly indicates that the need for the gas is one of the factors which the Commission may consider in determining whether the producer prices are in the public interest. Any doubt on this score is dissipated by Mr. Justice Harlan's statement in his concurring opinion (360 U.S. at 394):

> * * * There is no evidence supporting what appear to be the crucial findings that (1) "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas," particularly insofar as this finding implies that this need is immediate and cannot be satisfied from Tennessee's existing reserves * * *.

4. For these reasons the result below is, we believe, consistent with the principles applied by this Court in *Catco* and by the Commission and the courts in pre-*Catco* cases. See, e.g., *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, 257 F. 2d 634 (C.A. D.C.), certiorari granted, 358 U.S. 877, certiorari dismissed pursuant to Rule 60, 358 U.S. 948. The *Catco* case was *sui generis* because (1) the Commission had originally found that there was insufficient evidence to show that the sales at the proposed price were required by the public convenience and necessity—a finding never reversed or vacated—and (2)

there was nothing in the record to support the Commission's finding of the need for the gas which it had regarded as overriding price considerations. As we have shown, neither of the *Catco* infirmities is present here. Moreover, the Commission's decisions since *Catco* show that it is conscientiously continuing to apply the principles of this Court's decision in *Catco*.

Thus, since *Catco*, the Commission has twice conditioned the grant of certificates on the acceptance of lower initial prices by the producers. In *Transwestern Pipeline Co. et al.*, Docket Nos. G–14871, *et al.*, Opinion No. 328, August 10, 1959, the Commission found that the proposed initial prices exceeded the prices of comparable sales in the same area by from one to six cents and that certification of these high price contracts would result in an annual increase of $17,860,000 in the price to be paid by consumers in California. Expressly taking note of *Catco*, the Commission held that the public convenience and necessity required it to "hold the line" on further increases in the level of prices paid for natural gas and, accordingly, imposed price conditions reducing the producers' initial prices to the level of the existing prices in the fields involved.[12] All except one of the producers have accepted certificates so conditioned.

Similarly, in *Phillips Petroleum Co., et al.*, Docket Nos. G–15514 *et al.*, Opinion No. 330, October 13, 1959, the Commission, in granting the certificates for the producer sales there involved, required that the

[12] On September 23, 1959, the Commission granted the producers permission to present additional evidence to justify the initial contract prices.

proposed initial prices be reduced by two cents per Mcf, one cent above the previous high price in the area. The one cent increase was allowed principally because of higher development costs of the new field from which the sales are to be made. In reaching this conclusion, the Commission stated that "the risk of failing to substantiate the proposed price rests on [the certificate] applicants (Mimeo Op. p. 4).

While, as petitioners note (Pet. in No. 459, p. 26; Pet. in No. 473, p. 12), the Commission has also certificated producer sales without price conditions, the Commission has done so only because it was convinced that *Catco* did not require the imposition of price conditions in the situations there presented. Thus, in *South Georgia Natural Gas Co., et al.*, Docket Nos. G–9892, *et al.*, Opinion No. 325, August 7, 1959, the Commission, in its first post-*Catco* opinion, explained that, as it read *Catco*, "the producers' proposed initial price must be supported by substantial evidence establishing that the price is * * * in the public interest" and "that although the Commission should consider all the factors * * *, price is an element of prime importance [which] the Commission must scrutinize closely with a view to protecting the consumer and holding the line against price rises." (Mimeo Op. pp. 8–9). In applying this reading, the Commission found that the proposed prices were not out of line with other prices paid by the purchaser or other pipelines in the same general area, and that they would not trigger any general price rises. Moreover, the Commission noted that the purchase of gas at the proposed prices would increase the purchasing pipeline's aver-

age cost of purchased gas for 1961 by only .05 cent per Mcf. The impact of such an increase, the Commission concluded, was outweighed by the benefits of the proposed sales and the demonstrated need for the additional gas by the purchasing company's customers.

The Commission also certificated producer sales from southern Louisiana gas fields to Hope Natural Gas Company at the proposed base prices of 21 and 21.5 cents per Mcf in *Texas Gas Transmission Corp., et al.*, Docket Nos. G–17335, *et al.*, Opinion No. 327, August 10, 1959, rehearing denied, October 7, 1959. In that case, the record showed that the proposed prices would not result in any immediate increase in Hope's resale prices, that these prices would not set new plateaus either in offshore or onshore fields, and that the proposed producer prices would not trigger "favored nation" clauses, either to Hope or to other purchasers. By these showings coupled with Hope's demonstrated need for the gas, the Commission held, the producers sustained their burden of proving that the proposed prices were required by public convenience and necessity. In rejecting the contention of the New York Public Service Commission, petitioner in No. 459, that the sales should be conditioned on a price of 18 cents per Mcf, including tax, because that was the pre-*Catco* price level in southern Louisiana, the Commission, in addition to pointing out that the proposed prices were not out of line with the prevailing prices in these fields, firmly announced that it would consider "any new application based upon a price in excess of any price we have heretofore certificated to be 'out of line' and shall require conclusive proof from

the applicant that the public convenience and necessity requires certificates at that price" (Mimeo. Op. 13).[13]

Since *Catco* did not strike down the prices there involved as invalid *per se*, it would seem inappropriate for this Court to consider whether the Commission is adhering to *Catco* in a pre-*Catco* decision of the Commission. Moreover, in its post-*Catco* orders the Commission has been adhering closely to the *Catco* teachings and in accordance therewith is holding the line against further unwarranted increases in producer prices. In these circumstances, petitioners' attempt to relitigate the *Catco* issues and to ask this Court again to hold, in effect, that initial price must be justified by cost evidence (Pet. in No. 473, pp. 10–11) is premature at best.

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[13] Comparable considerations were relied on in certificating producers sales in the southern Louisiana area at prices of 21.4 and 21.5 cents per Mcf exclusive of tax reimbursement, in *Superior Oil Co., et al.*, Docket Nos. G-16580, *et al.*, August 10, 1959, rehearing denied, October 7, 1959; *Sunray Mid-Continent Oil Co.*, Docket No. G-14753, August 10, 1959, rehearing denied, October 6, 1959; *California Co., et al.*, Docket Nos. G-16108, *et al.*, August 10, 1959, rehearing denied, October 7, 1959; *Sun Oil Co., et al.*, Docket Nos. G-15122, *et al.*, August 10, 1959, rehearing denied, October 7, 1959.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that these petitions for writs of certiorari should be denied.

WILLARD W. GATCHELL,
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HOWARD E. WAHRENBROCK,
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PETER H. SCHIFF,
*Attorney,*
*Federal Power Commission.*

NOVEMBER 1959.

I have authorized the filing of this brief.

J. LEE RANKIN,
*Solicitor General.*

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JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

October Term, 1959

No. 159

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
*Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL.,
*Respondents*

No. 173

THE UNITED GAS IMPROVEMENT COMPANY,
*Petitioner*

PHILADELPHIA ELECTRIC COMPANY,
*Petitioner*

v.

FEDERAL POWER COMMISSION, ET AL.,
*Respondents*

## BRIEF AMICI CURIAE OF THE CITY OF PHILADELPHIA AND THE CITY OF PITTSBURG IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI


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IN THE

# Supreme Court of the United States

**October Term, 1959**

**No. 459**

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
*Petitioner*

*v.*

FEDERAL POWER COMMISSION, ET AL.,
*Respondents*

**No. 473**

THE UNITED GAS IMPROVEMENT COMPANY,
*Petitioner*

PHILADELPHIA ELECTRIC COMPANY,
*Petitioner*

*v.*

FEDERAL POWER COMMISSION, ET AL.,
*Respondents*

## BRIEF AMICI CURIAE OF THE CITY OF PHILADELPHIA AND THE CITY OF PITTSBURG IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

## OPINIONS BELOW

The Opinion of the United States Court of Appeals is not yet reported (See Decision printed in Public Service Commission of the State of New York Petition, Appendix A, and The United Gas Improvement Company and Philadelphia Electric Company Petition, Appendix A). The Opinion of the Federal Power Commission (R. 481-555) is reported at 20 FPC 264 (1958); the Commission's Order denying rehearing (R. 602-610) is reported at 20 FPC 571 (1958).

## JURISDICTION

The asserted grounds for jurisdiction are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

## QUESTIONS PRESENTED

The questions presented are set forth in the Petitions of the Public Service Commission of the State of New York and The United Gas Improvement Company and Philadelphia Electric Company.

## STATUTES INVOLVED

The applicable provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U. S. C. §717.717w, are printed in Appendix B of the Petition of the Public Service Commission of the State of New York and in Appendix B of the Petition of The United Gas Improvement Company and Philadelphia Electric Company.

## INTEREST OF AMICI CURIAE

The City of Philadelphia represents in this proceeding 600,000 of its citizens who are consumers of gas. Over one-third of the gas used in Philadelphia is supplied by the Transcontinental Gas Pipe Line Corporation (*Transco*). It is these citizens who ultimately pay for the increased gas prices permitted by the decision below even though, in some future Section 5 proceeding, the increase may subsequently be found to have been unwarranted.

The City of Pittsburgh represents in this proceeding its 670,000 citizens, the majority of whom are consumers of

natural gas. Transcontinental Gas Pipe Line Corporation is a supplier of the Manufacturers Light and Heat Company, whose 253,000 customers in Pennsylvania include 22,400 residental accounts in the City of Pittsburgh itself. It is these consumers who will pay any rate increases which may result from an adverse ruling in the case at bar.

The prices approved by the Court below are 80% above Transco's average cost of purchased gas. These higher rates will trigger "favored nation" pricing clauses in other of Transco's gas purchase contracts and bring about increases aggregating $5,000,000 annually.

This Court declared that the purpose of the Natural Gas Act was to provide consumers with natural gas at the lowest possible reasonable rates.[1] The effect of the decision below is to saddle consumers with the highest possible rate the market will bear.

This Court viewed Section 7 as a bulwark against exploitation of the consumer.[2] The effect of the decision below is to strip Section 7 of all consumer safeguards.

The only effective means, under the Natural Gas Act, of controlling price increases is the conditioning of certificates as to price in Section 7 proceedings. Such was the holding in *CATCO*.[3] Therein this Court declared that unconditional certification should be refused "where the application on its face or on presentation of evidence *signals* the existence of a situation that *probably* would not be in the public interest."[4]

Especially did this Court demand the "most careful scrutiny"[5] of initial price proposals. And where, as here, the proposed contract price was higher than any previously

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[1] *Atlantic Refining Co. et al. v. Public Service Commission of the State of New York*, 360 U. S. 378, 388 (1959), hereafter referred to as "CATCO."

[2] 360 U. S. at 391.

[3] Ibid.

[4] 360 U. S. at 391 (emphasis supplied).

[5] 360 U. S. at 391.

paid, where, as here, there was no inquiry into the reasons why the proposed price rate exceeded prior prices, where, as here, there was no analysis of the relative costs of production, and where, as here, the evidence showed that certification at the proposed price would trigger increases in contracts containing "favored nation" clauses, this Court held that the Commission could not issue a permanent, unconditioned certificate.

Yet, the Court below has affirmed permanent certification absent any of the price analyses required by the *CATCO* decision. The decision below, coupled with the decision of the Commission, wherein the majority doubted their power under Section 7 to attach a price condition to a certificate, leaves consumers virtually defenseless against unwarranted price increases.

## REASONS FOR GRANTING THE WRIT

### I. The Importance of the Questions Presented to the Proper Administration of the Act Requires the Granting of Certiorari.

Certiorari should be granted in this case for all the reasons which dictated the grant of certiorari in *CATCO*.

Clarification and reaffirmation of the Commission's responsibility, in Section 7 proceedings, to analyze proposed price increases is vitally "important during this formative period when the ground rules of producer regulations are being evolved." [6] The opinion below is the first interpreting and applying this Court's *CATCO* decision. The Court below, and the Commission in subsequent cases,[7] have in-

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[6] 360 U. S. at 391.

[7] *The California Company*, Docket No. G-16108, *et al.*, August 10, 1959; *Sun Oil Company, et al.*, Docket No. G-15122, *et al.*, August 10, 1959; *Sunray Mid-Continent Oil Company*, Docket No. G-14753, August 10, 1959; *Superior Oil Company, et al.*, Docket No. G-16380, *et al.*, August 10, 1959; *Texas Gas Transmission Corp., et al.*, Docket No. G-17335, *et al.*, Opinion No. 327, issued August 10, 1959; *South Georgia Natural Gas Company, et al.*, Opinion No. 325, issued August 7, 1959.

terpreted the *CATCO* decision as requiring no change in Commission practice in Section 7 proceedings. The present decision approves the Commission's issuance of unconditioned certificates authorzing sales of natural gas at significantly increased prices without having given any greater consideration to those prices than that found to be insufficient in *CATCO*.

Thus, the decision below, in effect, ignores and nullifies the teachings of *CATCO*. If the Act is to be administered so as to "afford consumers a complete, permanent and effective bond of protection from the excessive rates and charges," this Court must grant certiorari.[8]

## II. The Decision Below Is in Direct Conflict With the Catco Case.

This case is indistinguishable from *CATCO;* in every significant respect the records of the two cases are parallel.[9] In each case the Commission followed the same premises to reach the identical conclusions: (1) the opponents of certification have the burden of proof on the issue of price justification; (2) no cost evidence need be introduced, nor need detailed findings supporting price increases be made; and (3) in any event, the Commission's power to attach a price condition is doubtful.

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[8] 360 U. S. at 388.

[9] The only difference between *CATCO* and the instant case is that in *CATCO* there was no evidence of a need for the gas supplies, whereas in the present case such a finding was made. (The issue of need in *CATCO* was considered in a separate proceeding. Here, the Commission consolidated the pipeline and producer applications.)

This difference, however, is not material in view of the fact that in *CATCO* it was first determined that the evidence on the issue of price justification was insufficient to establish the public convenience and necessity before the question of whether the record supported a determination of need for the increased supply of gas was ever reached.

This Court in *CATCO* interpreted the Natural Gas Act as prohibiting the issuance of unconditional certificates "where the rate is not *clearly shown* to be required by the public convenience and necessity," [10] and placed the burden of justifying a rate increase upon the proponents of certification. The Court below affirmed the Commission's present decision which placed upon the opponents of unconditional certification the burden of showing that a price condition was required.

This Court, in *CATCO*, remanded the cause to the Commission because there was insufficient evidence to support the finding of public convenience and necessity which is required for the issuance of permanent certificates.[11] The Court below affirmed the Commission's present decision upon a record devoid of cost of production data.

This Court, in *CATCO*, viewed as "surprising" the Commission's failure to explain why the proposed price was 70% higher than the weighted average cost of gas to the pipeline company.[12] The Court below affirmed the Commission's decision which made no effort to investigate and explain why the proposed price was 80% higher than Transco's average cost of gas purchases.

This Court, in *CATCO*, found to be even "more damaging" evidence that the purchase price to the pipeline company was greatly in excess of any price previously paid in the area by the company.[13] The Court below affirmed the present issuance of certificates for purchases at prices six cents higher than any previously paid in the area by Transco.

This Court, in *CATCO*, remanded the cause where the evidence failed to support a finding that certification of a price would not trigger increases in leases with "favored nation" clauses resulting in price spirals.[14] The Court be-

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[10] 360 U. S. at 392. (emphasis supplied).
[11] 360 U. S. at 392-93.
[12] 360 U. S. at 393.
[13] Ibid.
[14] Ibid.

low affirmed the Commission's present decision approving Transco's purchase of gas at a rate which will activate such clauses in existing contracts and result in price increases of $5,000,000 a year.

This Court, in *CATCO*, held that the Commission has the power to attach price conditions where the proposed price "is out of line" or "its approval might result in a triggering of general price rises" or there might be "an increase in the applicant's existing rates." [15] The Court below affirmed the "balancing of the weight be given the various factors" by a Commission which doubted its power to attach price conditions.

The clear and direct conflict between *CATCO* and the present case requires the issuance of a writ of certiorari to correct the patent error of the Court below.

## Conclusion

For the foregoing reasons, it is respectfully urged that the Petitions for a Writ of Certiorari be granted.

Respectfully submitted,

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[15] 360 U. S. at 391.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1950

No. 459.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

*Petitioner,*

vs.

FEDERAL POWER COMMISSION,

*Respondent,*

PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PHILLIPS PETROLEUM COMPANY,

*Intervenor-Respondents.*

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR PETITIONER PUBLIC SERVICE COMMISSION IN REPLY.

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Albany, New York,
December 1, 1950.

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PAN AMERICAN PETROLEUM CORPORATION, ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, HUMBLE OIL & REFINING COMPANY, OHIO OIL COMPANY, OIL PARTICIPATIONS INCORPORATED, TIDEWATER OIL COMPANY, TRANSCONTINENTAL GAS PIPE LINE CORPORATION, CONTINENTAL OIL COMPANY, MAGNOLIA PETROLEUM COMPANY, PURE OIL COMPANY, SUN OIL COMPANY, UNION OIL COMPANY OF CALIFORNIA, W. H. HUNT, TRUSTEE FOR HASSIE HUNT TRUST, PHILLIPS PETROLEUM COMPANY,
Intervenor-Respondents.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.*

## BRIEF FOR PETITIONER PUBLIC SERVICE COMMISSION IN REPLY.

Briefs, in opposition to our petition for certiorari and for summary reversal of the judgment below, have been filed by (1) producers intervenor-respondent,* (2) the

* One of behalf of Pan American Petroleum Corporation and 10 others of the 26 producer-applicants before FPC; one on behalf of intervenor-respondent Sun Oil Company.

pipeline intervenor-respondent (Transco) and (3) the respondent Federal Power Commission (FPC).*

In different ways, each endeavors to depict the instant Catco-patterned and prompted, unconditional certification of 2½¢ per Mcf, southern Louisiana gas producer sales, as *Catco*-** blessed. In different ways, each represents that the only thing that prompted this Court to upset the Tennessee producer-suppliers' efforts to accomplish a comparable initial price elevation in *Catco* was the absence of evidence of "need" on the part of Tennessee and its customers for any additional gas supplies—an evidentiary defect not here present. In different ways, each asserts that given such evidence in a producer certificate case, the FPC may then "weigh[t]" that factor sufficiently to "counterbalance" (a) any and all deficiencies in the proof with respect to the propriety of the producer price *per se* and (b) any and all deleterious impacts upon the consumer which the price proposal may engender—and no Court may intrude. In different ways, each describes petitioner's contrary notions of the law as reflecting "misconstruction" or "misinterpretation" of the decision of this Court of June 22, 1959, which bears petitioner's name. In effect, each would relegate some 6 pages of this Court's opinion in that case—pertaining to respondent's statutory duty under Section 7 of the Natural Gas Act, when confronted with high-price producer certificate applications—to the status of *obiter dicta*.

With the respective contentions we will deal *seriatim* (*infra*). First, however, we would place before the Court what we conceive to be the heart of this Court's recent

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* Just as was the case in *Catco*, the respondent's brief is *not* signed by the Solicitor General.

** *Atlantic Refining Co., et al.* v. *Public Service Commission of New York*, 360 U. S. 378 (June 22, 1959).

pronouncement respecting (1) the producer's obligation in a Section 7 certificate case before FPC and (2) that agency's responsibilities with respect thereto—the pronouncement differing markedly from the previous* (and evidently persistent**) conceptions of the producers, the pipelines and the FPC on the subject.

"II. The Validity of the Order

The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944). As the original 7 (c) provided, it was 'the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of

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* *Matter of Continental Oil Co., et al.* (Catco), 17 FPC 880 (June 24, 1957); *Matter of Southern Natural Gas Co.*, 19 FPC 558 (April 18, 1958); *Matter of Transcontinental Gas Pipe Line Corp.*, 20 FPC 264 (Op. No. 315, September 4, 1958). See brief for respondent Public Service Commission in *Atlantic Refining Co., et al.* v. *PSC*, 360 U. S. 378, at pp. 36-42. *Catco* overruled the first cited determination and, we here submit, the last as well. In addition, it mandated expeditious Section 5 rectification of the damage done by the intervening, equally defective high-price certification—a course the FPC directed but, to date, has not pursued. See Transco brief, App. E.

** *Matter of Trunkline Gas Co., et al.*, Docket No. G-1539 (Op. No. 321, May 22, 1959; rehearing rejected, July 22, 1959); *Matter of Texas Gas Transmission Co., et al.*, Docket No. G-17335, Op. No. 327 (August 10, 1959); *Matter of the California Co., et al.*, Docket No. G-16108 (August 10, 1959); *Matter of Sun Oil Co., et al.*, Docket No. G-15122 (August 10, 1959); *Matter of Sunray Mid-Continent Oil Co.*, Docket No. 14753 (August 10, 1959); *Matter of Superior Oil Co., et al.*, Docket No. G-16380 (August 10, 1959)—referred to at p. 26 of PSC petition for certiorari herein. Petitions for judicial rectification of *each* such erroneous application of *Catco* are now pending in various Courts of Appeal.

adequate service in the public interest.' 52 Stat. 825.[7] The Act was so framed as to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any 'proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity,' §7 (e), 15 U. S. C. §717f (e), and that all rates and charges 'made, demanded or received' shall be 'just and reasonable,' §4, 15 U. S. C. §717 (c). The Act prohibits such movements unless and until the Commission issues a certificate of public convenience and necessity therefor, §7 (c), 15 U. S. C. §717f (c). Section 7 (e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision of §4 and the posting of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases. The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in §5 of the Act, 15 U. S. C. §717d, which authorizes the Commission *sua sponte*, or otherwise, to institute an inves-

[7] The 1942 amendments to §7, 56 Stat. 83, were not intended to change this declaration of purpose. See Hearings, House Interstate and Foreign Commerce Committee, on H. R. 5249, 77th Cong., 1st Sess. 18-19; H. R. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong., 2d Sess.

tigation into existing rates and charges and to fix them at a just and reasonable level. Under this section, however, the rate found by the Commission to be just and reasonable becomes effective prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a §5 proceeding.

In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under §7 (e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in §5 proceedings through which initial certificated rates are reviewable appears nigh interminable. Although *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, was decided in 1954, cases instituted under §5 are still in the investigative stage. This long delay, without the protection of refund, as is possible in a §4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under §7 makes it the more important, as the Commission itself says, that 'this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest.' 17 F. P. C. 563, 575.

This is especially true where, as here, the initial price will set a pattern in an area where enormous reserves of gas appear to be present. We note that in petitioners' proof a map of the Continental Shelf area off of the cost of Louisiana shows that the leases here involved cover but 17 out of a blocked-out area covering some 900 blocks of 5,000 acres each. The potential of this vast acreage, in light of discoveries already made as shown by the record, is stupendous. The Commission has found that the transaction here covers the largest reserve ever committed to interstate commerce in a single sale. Indications are that it is

but a puff in comparison to the enormous potentials present under the seabed of the Gulf. The price certificated will in effect become the floor for future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 25 cents per M(F. New price plateaus will thus be created as new contracts are made and unless controlled will result in 'exploitation' at the expense of the consumer, who eventually pays for the increases in his monthly bill.

It is true that the Act does not require a determination of just and reasonable rates in a §7 proceeding as it does in one under either §4 or §5. Nor do we hold that a 'just and reasonable' rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of §5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under §7. Their proposals must be supported by evidence showing their necessity to 'the present or future public convenience and necessity' before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for §7 (e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.

There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in §7 (e),

has authorized the Commission to condition certificates in such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of 'favored nation' clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.

This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in '7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of the Congress 'to create a comprehensive and effective regulatory scheme,' *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U. S. 507, 520 (1947), is given full recognition. And '7 is given only that scope necessary for 'a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission . . .' *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* at 341. On the other hand if unconditional certificates are issued where the

rate is not clearly shown to be required by the public convenience and necessity, relief is limited to §5 proceedings, and, as we have indicated, full protection of the public interest is not afforded.'

Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The witnesses tendered developed little more information than was included in the printed contracts. As the proposed contract price was higher than any paid by Tennessee, including offshore production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas. Moreover the record indicates that the proposed price was some 70¢ higher than the weighted average cost of gas to Tennessee; still no effort was made to give the 'reason why.' More damaging, was the evidence that this price was greatly in excess of that which Tennessee pays from any lease in southern Louisiana. Likewise the $16,000,000 pipeline to the producers' wells was unsupported by evidence of practice or custom. Respondents contend — and it stands undenied — that this alone would add 2 cents per MCF to the cost of the gas. Again the free movement of distillates retained by the producers was 'shrugged off' as being *de minimis*, without any supporting data whatever. Nor was the evidence as to whether the certification of this price would 'trigger' increases in leases with 'favored nation' clauses convincing, and the claim that it would not lead to an increase in rates by Tennessee was not only unsupported but has already proven unfounded.'

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[8] Tennessee has subsequently filed an application with the the F. P. C. requesting higher rates designed to produce some $19,000,000 additional annual revenue. Tennessee Gas Transmission Co., Docket G-17166."

(*Atlantic Refining Co.* v. *Public Service Commission*, Oct. Term, 1958, Opinion of the Court, 360 U. S. 378, pp. 388-393.)

That that discussion, pertaining as it does to the necessity for adequate demonstration of the propriety of the *initial price* aspect of the Section 7 public convenience and necessity "complex", *presupposed* the presence of adequate evidentiary support for all other aspects of that "complex"—including "need" for the gas involved on the part of the pipeline-purchaser, and through it the purchaser's distributor customers—is, we think, self-evident. When the Court then went further, in the immediately following and concluding paragraph (360 U. S. 393-4), and properly observed (because *that* point had *also* been emphasized and it was an attribute of that case): "Nor do we find any support whatever in the record for the conclusory finding on which the order was based that 'the public served through the Tennessee Gas System is greatly in need of increased supplies of natural gas' ", ***the Court did not thereby limit the scope, pertinence or import of what it had previously said with respect to the necessity for demonstration of the necessity for the initial price, to situations where evidence of the purchaser's need for the gas was missing.*** Conversely, the Court did not thereby pronounce that *with* evidence of the purchaser's need present, everything it had previously said with respect to the necessity for demonstration of the propriety of the initial price became *dicta;* it did not hold that with evidence of need, the unsupported initial price aspect of the case before the FPC could be brushed aside or "counterbalanced" away: it did not say, hold or imply that inadequately supported unconditional certificates could properly be issued, regardless of the price impact, under a conclusory rationalization

that, on balance, the consumer would not be "adversely" affected (except in his pocketbook).

Such, however, is the essence of the contentions of the opponents of the instant petition.

## I.

## The Producers.

The producers contend that we are in error in our impression that *Catco* imposes an obligation upon them to "justify", their initial price proposals. All *Catco* requires, we are told, is that there must be evidence *of* (not necessarily supporting) "all factors" comprising the public convenience and necessity "complex"—including the purchaser's need for gas; that with each factor *so* evidenced, the FPC's "weighing" process may then proceed, with its outcome rendered immune from judicial review. Here, we are told, each factor *was* evidenced—the evidence pertaining to price consisting of demonstration of *what* it was, there being no necessity for the producers to show *why* it was what it was. This, it is said, is adequate demonstration that "the rate-level . . . [is] . . . in the public interest" (360 U. S. 390). This, it is said, is all that this Court meant in its observation that "Their [the producers' rate] proposals must be supported by evidence showing their necessity . . ." (360 U. S. 391). When, under such circumstances, the FPC proceeds to weigh all factors and grant permanent unconditional certification of the high price sale, it is said, this constitutes "most careful scrutiny [of] and responsible reaction to initial price proposals of producers" (360 U. S. 391), notwithstanding the various deleterious aspects

(impact) to ensue from such certification. Here, we are told, the initial prices may be and properly were denominated by FPC as not "adverse" to—though to be borne entirely by—the consuming public, because, (a) the *public* needs more gas*; (b) the *distributors* will effect great "savings" in paying high prices for this gas because it would cost them even more to manufacture similar quantities**; and (c) the *producers'* entitlement thereto (or lack thereof) is immaterial because the initial price level in the marketing area has not been breached. To establish the latter, reference is made to the Cateo sales (!) and those encompassed in other Cateo-inspired certificate cases decided by FPC between June 24, 1957 (Cateo) and September 4, 1958 (this one), *before* this Court advised the producers and the FPC of their respective obligations under

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* For discussions of the pertinence of this aspect of a producer certificate case in the evaluation of the propriety of the producer's price, see brief for respondent PSC in *Cateo*, Point III, pp. 56-57; Supplemental brief of respondent PSC in *Cateo*, Point I, pp. 5-9; and (since Transco has quoted out of context therefrom—Transco brief herein at p. 21) the following excerpt from the *Cateo* oral argument before this Court:

> "Mr. Brown: It is conceivable that there might be such a screaming need for gas under some circumstances, not here present, that they could junk price and not pay attention to it and not be guided principally by it. They cannot, we believe, bargain price away under the guise of need for expansion of gas facilities.
>
> The whole purpose of regulation presupposes need for the regulated commodity and a necessity for the exercise of price regulatory supervision. You do not bargain together and weigh one against the other and junk one or the other, as you elect. You must reconcile them both. That we think the Commission failed to do in its third order."

** For demonstration of the delusive character of this prop, erected in support of the determination under review in (by) the Court below, see PSC petition herein at pp. 17-20.

the Natural Gas Act with respect to unjustified initial price spirals. (See *supra*, p. 3, fn.*).*

## II.

## Transco.

In its brief Transco depicts with clarity and candor the "plight" of the pipeline middle-man—the conduit from the producer to the consumer of both the gas and its total cost. On the one hand, besieged by distributor company customers with actual or potential markets for more natural gas; in its own self-interest anxious to transport more and more gas—and on the other hand, confronted with a producer-sellers' market with ever-mounting and, to date,

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* Utilization of or even reference to the 23¢ sales which were unconditionally certificated in *Southern Natural Gas Co.*, Docket No. G-13082, *et al.*, 19 F. P. C. 558 (April 18, 1958)—for this or any other purpose—is particularly appalling. In the first place, this Petitioner was denied intervention by FPC in Southern Natural's gas acquisition proceedings, upon the ground that the prices to be paid to producers by that company did not and could not, adversely or otherwise, affect our interests! (See P. S. C. Petition for Certiorari, p. 16, ftn.*). In the second place, as casual perusal of the FPC order discloses (see *verbatim* copy, Transco Brief, Appendix E) the only other potential consumer-objector to those high-priced sales was induced to withdraw from the proceedings and the applications were thereafter submitted to the FPC without hearing and hence without *any* evidence supporting *any* facet, much less the initial price aspect thereof. Finally, in certificating the sales, while Respondent observed in passing that: "These proposed prices [22.8¢ per Mcf] will be among the highest to be paid for natural gas produced in the Southern Louisiana area. In view of this fact, we will by subsequent order institute investigations pursuant to Section 5(a) of the Natural Gas Act as to the reasonableness of the prices proposed . . .", notwithstanding the passage of more than a year and a half, no such proceedings have been instituted or pursued. All of this notwithstanding, these Southern Natural certifications are now held forth (extolled) as demonstrative of the legitimate "going price line" in the area (See Transco Brief, p. 23; F. P. C. Brief, p. 10)!

unrestrained (by FPC) price demands (to be met or no sale)—the pipeline-purchaser is compelled to compete with (endeavor to out-bid) other would-be purchasers in the field. And they all are, in general, at the mercy of a handful of gigantic producer-sellers who control the bulk of the supply. In most instances the bidding starts at the level of the highest previous sale in the area. Both the seller and the purchaser are aware of the necessity for subsequent FPC certification of the sale but this imposes little or no restraint upon the full application of the "what-the-market-will-bear" bidding process because, to date, for southern Louisiana sales FPC has used as the measure of what it would certificate, precisely whatever emerged from such negotiations!

When later before FPC in quest of such certification and confronted with (1) the producer-seller's adamant refusal to justify, explain, rationalize or even comment upon his price and (2) the "pay-all-cost" consumer demanding that certification, if granted, be conditioned for his protection, the pipeline-purchaser promptly points to the likelihood of such FPC action occasioning its loss of the gas involved. Hence, in pipeline conception, the FPC's statutory price conditioning power should *never* be exercised by it in such a context. When the consumer-prompted Court review of the invariably ensuing unconditional certification is instituted, the pipeline company erects the same loss-of-gas chamber of horrors, by then buttressed by the *fait accompli* of the new pipeline facilities which were, in the interim, constructed to accommodate the subject supply. Hence, in pipeline conception, *no Court* should ever deign to reverse an FPC producer-pipeline certification because such might "jeopardize" the continuity of its gas supply

and its multi-million dollar capital expenditure made to secure it.*

Such is the content of the instant Transco presentation. It would seem obvious enough that if the *Catco*-pronounced principles of FPC certification of proposed producer interstate sales had been consistently applied in the past, the depicted pipeline "plight" would never have arisen. It would seem equally obvious that if they are consistently applied by both FPC and the Courts sitting in review of FPC certifications, now and in the future, the plight will evaporate. *All* producer-sellers seeking interstate disposition of their gas will be subject to the same requirements: i. e., (a) demonstrate the propriety of the price or (b) expect the certificate to be conditioned at a price level which will not unreasonably impinge upon the ultimate consumer. *All* interstate pipelines will be in comparable competitive positions, in this respect, as purchasers of the needed commodity.

## III.

## The Respondent.

The brief for respondent FPC reflects, better than we could hope to, the complete misinterpretation by the Court below of the import of *Catco* and FPC's own great relief in having *Catco* so undermined. To demonstrate:

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* Neither has been "jeopardized" for Tennessee as the result of *Catco*. (Catco gas started flowing at 22.4¢ per Mcf in June, 1958, and is still flowing, under temporary certificates conditioned as to price upon final outcome of the FPC determination upon the remand directed by this Court.) Neither is likely to be "jeopardized" for Transco by the action of this Court which is so patently called for herein.

1. *Catco*, says the FPC, held that the producer's price must be justified *either* by proof supporting it *per se*, *or* by evidence of public need for the gas involved. Here, admittedly, the former is entirely lacking, but the latter has been supplied—hence the unconditional certification meets the *Catco* test (citing the decision below and its own August 10, 1959 series of 23¢ southern Louisiana unconditional certifications granted *6 days* after release of the opinion below and expressly in reliance thereupon—*supra*, p. 3 ftn.**).

2. *Catco*, the FPC agrees, erected certain "signals" which should prompt its careful scrutiny of and responsible reaction to the producer's price proposal, namely, (a) comparison thereof with the legitimate "going price line" in the area and (b) its impact upon the purchasing pipeline, through triggering or otherwise. Here, says the FPC, the initial price proposals were "in line", in that Catco purchases and others so inspired are comparable—and whether the comparatives are legitimate or no is not material—they are factual unless and until reduced in Section 5 proceedings; here, admittedly, the impact of the instant purchases upon Transco will mean increased costs to its (Transco's) customers—but they agreed to them and, besides, their need for gas outweighs such impact and renders the latter "not adverse".

3. In two instances, says FPC, we have—in accordance with the teachings of *Catco*—exercised our price conditioning prerogatives to maintain the price level, in other than southern Louisiana fields, at or about the highest level heretofore certificated [and this has been done (temporarily) notwithstanding the presence of evidence in those two cases of urgent public need for the gas supplies involved!] Accordingly, says FPC, there is no need for

this Court to grant certiorari herein and discourse again—so soon after Catco—on the subject of Section 7 of the Natural Gas Act.

## Conclusion.

With the latter portion of the FPC's presentation we are in total accord. There is no need for this Court to re-state its lucid *Catco* dissertation upon respondent's duties and obligations under Section 7 of the Natural Gas Act. There is, however, an obvious, vital need for this Court to act upon the instant petitions in such a way as to preserve the integrity of this Court's June 22, 1959 pronouncement upon the subject. This may be accomplished by grant of the applications and summary reversal of the judgment below, upon the cited authority of *Atlantic Refining Co., et al.* v. *Public Service Commission of the State of New York,* 360 U. S. 378. This, on behalf of the millions of gas consumers we represent, we respectfully urge.

Respectfully submitted,

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